Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMERICAN LIFE LEAGUE INC., *et al*

Petitioners,

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress have the constitutional authority under the Commerce Clause, Section 5 of the Fourteenth Amendment and the Tenth Amendment to enact the Freedom of Access to Clinical Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, which, *inter alia,* makes criminal, and subject to civil damages, even the nonviolent physical obstruction of entrances to reproductive health services?

2. Did Congress in enacting FACE abridge the freedom of expression protected by the First Amendment by creating content- and viewpoint-based restrictions upon political expression?

3. Did Congress in enacting FACE violate Petitioners' rights under the First Amendment Free Exercise Clause and the terms of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.*?

PARTIES TO THE PROCEEDINGS

There is no parent or subsidiary company to be listed with respect to Petitioner American Life League, Inc. ("ALL"). Rule 29.1.

Petitioner ALL is a District of Columbia corporation, incorporated in 1981, with its office in Stafford, Virginia; recognized under 26 U.S.C. § 501(c)(3) as tax-exempt, with some 300 thousand donors.

Petitioners Antoinette C. Cleary, David G. P. Englefield, Patricia Lohman, Patricia Savino and (the Reverend Father) Gerald Weymes are individual U. S. citizens.

Respondent Janet Reno is Attorney General of the United States, as such charged with enforcement of FACE; and is sued in her official capacity.

The District Court allowed five defending intervenors: the National Abortion Federation; the National Organization for Women; Commonwealth Women's Clinic and Capitol Women's Center; and Dr. George Tiller and Dr. Susan Wickland. The District Court also accepted, as did the Fourth Circuit, an *amicus* brief from the American Civil Liberties Union and the ACLU Foundation of Virginia.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

AMERICAN LIFE LEAGUE, INC., et al.

Petitioners,

v.

JANET RENO,
Attorney General of the United States

Respondent.

The American Life League, Inc., ("ALL"), Antoinette C. Cleary, David G. P. Englefield, Patricia Lohman, Patricia Savino and the Reverend Father Gerald Weymes respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 47 F.3d 642 (4th Cir. 1995). Appendix, at 1. The opinion of the United States District Court is reported at 855 F. Supp. 137 (E.D. Va. 1994). App. at 25a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Petitioners seek review of the Fourth Circuit's judgment entered on February 13, 1995.

STATUTORY PROVISION INVOLVED

This case presents Commerce Clause and First Amendment violations.

Petitioners sued to have FACE declared facially unconstitutional.

STATEMENT OF THE CASE

This case presents Commerce Clause and First Amendment issues.

Petitioners sued Janet Reno, Attorney General of the United States, in her representative capacity, in the United States District Court for the Eastern District of Virginia on May 26, 1994, the day President Clinton signed FACE into law, invoking jurisdiction under 28 U.S.C. §§ 1331 and 1346(a)(2), seeking declaratory and injunctive relief arising under the Constitution, Article I, First and Fifth Amendments, and declaratory relief under 28 U.S.C. § 2201. Petitioners sought (1) class certification; (2) a declaration that FACE is null and void as violative of the Constitution; (3) a declaration that FACE is null and void as violative of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.* ("Religious Act"); and (4) preliminary and permanent injunctions against enforcement of FACE.

Petitioner ALL researches; publishes a magazine, newsletters, brochures and other material relating to the human rights of persons born and unborn; has televised a program called *Celebrate Life!*; sponsors, and participates in, symposia and other public and invitational means of discussion and education; monitors, and reports upon, state and federal administrative, legislative and judicial developments; and otherwise seeks to fulfill its corporate mandate and the concerns of its donors. ALL has professional and volunteer staff.

Individual Petitioners and donors to ALL nonviolently have demonstrated, prayed and/or sidewalk-counseled in the proximity of an abortion clinic, often in company of other individuals similarly peaceably behaving. They do not anticipate, approve, condone, have prior knowledge of or ratify, nonpeaceable or violent conduct. In the aggregate, their action at times has constituted, and in the future will constitute, in the words of FACE, a "physical obstruction" (that is, temporarily rendering impassable ingress to an abortion facility). In the course of their peaceful pursuit, in the words of FACE, they (1) "interfere" (that is, restrict local freedom of movement [but only by virtue of proximity to a pregnant mother]); and/or (2) "intimidate" (that is, create a reasonable - but unfounded - apprehension of bodily harm); and/or (3) "injure" (that is, cause, e.g., monetary loss to an abortion facility; and/or emotional concern of a pregnant mother considering abortion; and/or psychological reaction of the mother; and/or familial reaction).

Absent enforcement of FACE, they peaceably would continue these local and noncommercial speech manifestations. As long as FACE is enforceable, they are in fear and jeopardy in so doing. As a result of exercising constitutionally protected

activities, ALL has been sued, in both federal and state court, by abortion-providers. No plaintiff ever has obtained a final judgment against ALL and ALL has settled no case.

Individual Petitioners are persons opposed to abortion upon theological, moral and other grounds; who have demonstrated, prayed and/or sidewalk-counseled within the vicinity of abortion clinics; and whose views, religion and activities, absent a FACE-induced chill, fall within the range of ALL-donor activities enumerated in the preceding paragraph.

On June 1, 1994, the Attorney General filed a F. R. Civ. P. 12 (b)(6) motion to dismiss. The District Court heard oral argument on June 10, 1994, and issued an opinion and order on June 16, 1994, dismissing the Second Amended Complaint with prejudice.

On February 13, 1995, the Court of Appeals for the Fourth Circuit affirmed.

FACE is a criminal statute that provides for both criminal and civil penalties against anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so,

> because such facility provides reproductive health services . . . .
>
> 18 U.S.C. § 248(a).

FACE defines its key terms in § 248(c); in § 248(d) it also provides a rule of construction that nothing in the Act shall be construed "(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution."

The criminal penalties in § 248 (b) vary with the nature of the crime. For a first offense involving only a nonviolent physical obstruction, the penalty is imprisonment for not more than six months or a fine of not more than $10,000. Civil remedies, § 248(c), include injunctive relief, compensatory or statutory damages ($5,000 per violation), punitive damages and costs and fees. Anyone injured in providing or obtaining services at a reproductive health facility is entitled to file a civil action under this provision. The Attorney General of the United States and any State Attorney General are also permitted to bring certain civil actions.

The Court of Appeals summarily rejected Petitioners' contention that Congress lacked the power under the Commerce Clause, §5 of the Fourteenth Amendment and the Tenth Amendment to enact FACE, relying entirely upon *Hodel v. Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264 (1981); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); and *Katzenbach v. McClury,* 379 U.S. 254 (1964). The Court was silent about *United States v. Lopez,* 2 F.3d 1342 (5th Cir. 1993), and Petitioners' *Lopez* arguments. The Court did not distinguish between "affecting" and "substantially

affecting" interstate commerce but held "affecting" to be a sufficient nexus. According to the Court, Congress reached a rational conclusion in finding that violence, threats and physical obstruction affect interstate commerce. Similarly, Congress adopted regulatory means that were reasonable given the permissible ends it had in mind to deter violence. Finally, in response to Petitioners' claim that FACE jeopardized federalism, the Court said that Congress, not the courts, decides whether new laws are needed.

The Court holds that the conduct enjoined by FACE is not First Amendment-protected speech. The Court stated that it would not apply a strict-scrutiny test, as Petitioners advocated, because FACE is content- and viewpoint-neutral, thus requiring an intermediate-scrutiny test. In the words of the Court, "a statute regulating expressive conduct is neutral if it is justified without reference to the content of the violator's message or point of view," citing *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2523-24 (1994) and *Ward v. Rock Against Racism*, 491 U.S. 788, 791 (1989). App. at 9a-10a. In short, congressional purpose controls. Where a statute may regulate conduct that contains protected speech elements, the Court continues, a court must use the intermediate scrutiny test that was first described by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968).

The Court then rejected Petitioners' arguments that FACE is overly broad and vague and that under *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a party may recover only actual damages by saying it knows of no rule that limits recovery when unprotected expression is involved. The Court concludes that neither the Free Exercise Clause nor the Religious Act requires striking FACE as unconstitutional.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The Fourth Circuit decision conflicts with recently decided *United States v. Lopez* because FACE (1) exceeds Commerce Clause congressional power; (2) expands federal criminal jurisdiction beyond the power of Congress; and (3) intrudes upon federalism unjustified by § 5 of the Fourteenth Amendment. The decision also conflicts with First Amendment jurisprudence. This case is a timely and rare opportunity to provide guidance for the Judiciary which will be dealing with FACE questions arising from at least seventeen cases, with the high probability that many more cases will ensue. Meantime, unnumbered thousands of law-abiding prolife citizens are chilled from exercising their First Amendment rights by the omnipresent threat of a macedonian phalanx of federal forces ready to usurp traditional local police power.

I. FACE Is Beyond Commerce Clause Authority under *United States v. Lopez*; Is Not Authorized by §5 of the Fourteenth Amendment; and Constitutes an Unauthorized Incursion upon Federalism and the Federal Judiciary

A. There Is No Constitutional Authority for a Federal Statute Punishing Local Obstruction of Abortion Clinics

Before both tribunals Petitioners maintained that Congress lacks authority under the Commerce Clause, § 5 of the Fourteenth Amendment and the Tenth Amendment to enact

FACE. The Fourth Circuit and the District Court paid little heed to these arguments, made no real analysis of the failed congressional attempt to color FACE constitutional in interstate commerce terms and simply accepted the Government's claims under a rubric that, in the Circuit Court's words, "We conclude that the commerce power permits Congress to regulate activities affecting reproductive health services." App. at 1a-2a. This was beyond legislative power because it displaced state and local criminal statutes and ordinances designed to regulate the same conduct without any meaningful showing that interstate commerce was involved.

In *United States v. Lopez*, #93-1260, (April 26, 1995),[1] the Court had before it the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. § 922(q)(1)(A). The Court took the opportunity to define more precisely the limits of Commerce Clause power.

There are "three broad categories . . .that Congress may regulate under its commerce power." *Slip op.* at 9.

> First , Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate

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1

In both the Fourth Circuit and the District Court Petitioners relied upon the Fifth Circuit decision to reverse the *Lopez* conviction under the Gun-Free School Zones Act because the Act was beyond Congress' power under the Commerce Clause. 2 F.3d 1342 (5th Cir. 1993). This Court's April 26, 1995 *Lopez* decision was rendered after issuance of the Fourth Circuit mandate herein on April 7, 1995.

> commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce. . . .
> *Slip op.* at 9-10.

The first two categories did not encompass the Gun-Free statute. The Court held as to the third category -- "those activities that substantially affect interstate commerce" -- that § 922(q) had nothing to do with interstate commerce. The statute is criminal and "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* § 992(q) also "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* Although the Court will consider legislative findings when evaluating a statute in commerce terms, it observes that Congress is not required to make such findings.

The Court concludes that it will not "pile inference upon inference" and "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* The Court is unwilling to acquiesce in the obliteration of "what is truly national and what is truly local" in the Commerce Clause. *Id.*

FACE, too, fails to reflect any *substantial* affect on interstate commerce. In *Lopez* this Court drew a line beyond which it said Congress could not go to enact legislation that supposedly deals with practices which impact interstate

commerce. As egregiously as in *Lopez,* Congress pushed federalism aside and enacted FACE to make it a federal crime to obstruct or interfere with, violently or peaceably, reproductive health facilities in every locality in the nation.

To buttress the shaky constitutional basis for FACE, its Senate proponents temporarily inserted findings designed to masquerade the proscribed conduct as interstate commerce. They recited that abortion providers buy products in interstate commerce and that the activities of abortion-protesters may restrict such commerce. S. 636, 103d Congress, 1st Session, 139 Cong. Rec. S15655 (Daily ed., November 16, 1993). These boilerplate provisions offer no indication, however, that the protestors have the required "substantial" affect upon interstate commerce, or that such commercial affect, if any, was among the real legislative purposes of FACE. FACE as enacted *omits* the findings, while substituting an anemic and conclusory reference to interstate commerce, in an expansive and nonspecific "Purpose" clause. 18 U.S.C. § 248, setting out §2, Pub. L. 103-259.

To support FACE Congress may have relied upon four considerations. Congress evidently considered, for instance, that abortion clinics operate in interstate commerce. By that sweep who or what does not operate in interstate commerce? Every person and entity would be subject to minute federal regulation. Congressional supporters also claimed that people travel across state lines to clinics to procure abortions. Who does not cross state lines? If one considered only Washington Metropolitan Area residents, one would note that five Justices regularly cross state lines: if one stopped to pray near an abortion clinic, would he or she be drawn into interstate commerce, "substantially affect interstate commerce," have a "concrete tie to intrastate commerce" or engage in "an

economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce?" So neither would the pregnant mother, if any, who crosses a state line to procure an abortion.

By the reasoning supporting FACE, local disturbance around clinics lowers the number of abortions and therefore affects interstate commerce. By this standard any local action adverse to any business could be enjoined by federal statute because it could decrease demand for goods or services. It is asserted that clinic violence is a nationwide problem over which States have lost control. No basis for such advocacy is shown -- not surprising given the manifold state laws against violence and trespass. Yet a more basic question remains: does that mean that whenever Congress perceives a local problem occurring in many localities it may legislate to control the problem, regardless of lack of substantial connection with interstate commerce? *Lopez* requires otherwise.

In *United States v. Wilson*, #94-CR-140, *slip op.* (E.D. Wisc. March 16, 1995), LEXIS 3439, the District Court struck down the FACE provision that prohibits nonviolent physical obstruction of entrances to clinics.

Wilson seems anticipatory of *Lopez*, for it looks to FACE in Commerce and Fourteenth Amendment terms, finding no substantial connection with interstate commerce. *Wilson* is the only adjudicated FACE case to analyze the interstate commerce question in a serious way. All the other decisions have skipped that issue and reached the customary conclusion that the interstate commerce requirement had been met, whether in fact it had.

Petitioners twice have raised the interstate commerce

issue but have been ignored. The question is important, accentuated by *Lopez*. The Court should settle the matter, by enunciating standards by which Congress may legislate and the Judiciary may adjudicate.

Lopez struck down a statute that had no affect upon interstate commerce, any more than the activities of private local anti-abortion demonstrators have. Like FACE, the Gun-Free statute did not require a showing of particular connection to interstate commerce as an element of the federal crime it created. Nor did it contain explicit findings with respect to interstate commerce. This Court declined to assume that interstate commerce was affected in every case in which someone possessed a firearm within 1,000 feet of a school. Because neither an interstate commercial purpose nor a substantial economic effect upon interstate commerce had been shown, the statute fell. So, too, should FACE. It bears all the constitutional frailties of the Gun-Free law and puts the Government into strictly local law enforcement in a mockery of federalism.[2]

B. §5 of the Fourteenth Amendment Does Not Authorize Congress to Punish Private Anti-abortion Activities

§ 5 of the Fourteenth Amendment authorizes Congress to provide for penalties against some forms of private interference with the exercise of certain constitutional rights.

2

In no pleading, argument or opinion in the case below was there an effort to link the local activity of Petitioners herein to the affecting of interstate commerce, much less to the substantial affecting of interstate commerce or to a substantial economic activity.

Griffin v. Breckenridge, 403 U.S. 88 (1971). A fundamental restriction upon this power is that it must be directed at rights which the Constitution itself protects against private interference.

In *Carpenters v. Scott,* 463 U.S. 825 (1983), the Supreme Court considered the application of 42 U.S.C. § 1985(3), having its origin in the Civil Rights Act of 1871, to a private conspiracy aimed at preventing the exercise of First Amendment rights. The Court holds that § 1985(3) affords no cause of action against persons engaged in such a conspiracy, because the rights in question are not among those "protected against private, as well as official, encroachment." 463 U.S. at 833. In *Bray v. Alexandria Women's Health Clinic,* 113 S. Ct. 753 (1993), the Court applied the rule of *Carpenters* to an action under § 1985(3) against persons who had obstructed access to abortion clinics. Because the right to abortion, like other elements of the general right to privacy upon which it is based, is "obviously *not* protected against private infringement," there could be no cause of action under the civil rights law. *Id.* at 764. [Emphasis by the Court.]

Although the precise questions presented in *Bray* and *Carpenters* involve statutory interpretation, the limiting constructions are designed to avoid the "'*constitutional* shoals that would lie in the path of interpreting §1985(3) as a general federal tort law.'" *Bray*, 113 S. Ct. at 759, quoting *Griffin,* 403 U.S. at 102. [Emphasis supplied.] Thus, while enactment of FACE may have cured some *Bray* defects, it cannot cure the fundamental defect presented by the constitutional impossibility of a private violation of a right which the Constitution protects only against governmental infringement. "A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth." *Bray,* 113

S. Ct. at 764. Similarly, there can be no federal protection against private conspiracies to violate the constitutional right to abortion because "deprivation of that federal right (whatever its contours) *cannot* be the object of a purely private conspiracy." *Id.* [Emphasis supplied.] Therefore, although "[t]respassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises," *Id.* at 768, § 5 of the Fourteenth Amendment provides no more constitutional authority for a federal statute against anti-abortion trespassers or clinic obstructors than it does for a general federal law against burglary or mugging.

C. This Court Should Resist the FACE Legislative Incursion upon Federalism and the Federal Judiciary

The Founders' fear of majority legislative tyranny prompted insistence upon an independent Federal Judiciary. See J. Madison, A. Hamilton, J. Jay, *The Federalist*, #78. Many unpopular, even despicable, persons have found protection in federal courts. The federal courts once had the support of elite opinion -- particularly law journals -- in safeguarding the rights of minorities to speak and protest. In an age of political correctness, however, some are rethinking their commitment to "unrestricted" free speech. See C. Sunnstein, *Democracy and the Problem of Free Speech* (New York; The Free Press, 1993) ("We are in the midst of a dramatic period of new thought about the meaning of free speech in America", at ix). Limits which in the past would have been judged content- or viewpoint-based, with a slight lens adjustment, may survive scrutiny.

Federal restraint upon free speech has been relatively rare. The overwhelming majority of cases striking down

statutes and ordinances under the First Amendment have come from state law. Areas of criminal law once deemed to be exclusively within the province of states have been federalized. See J. Baker, "Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?" 16 Rutgers L.J. 495 (1985). Federalization of crime has been occurring because the normal checks and balances within Congress do not seem to operate where crime is concerned. Congress greatly has expanded federal criminal jurisdiction -- which should be cause for alarm within the Federal Judiciary.

Although Congress no longer may question its authority to federalize crime, the Judiciary must. *The issue is not merely whether Congress has power to intrude upon the States but also how far it has power to intrude upon the federal courts.* While threats to the Judiciary from Congress generally have been viewed in terms of removing jurisdiction, Congress in fact rarely removes jurisdiction. See Baucus and Kay, "The Court Stripping Bills: Their Impact on the Constitution, the Courts and Congress," 27 Vill L.R. 988 (1982). The trend has been the opposite. As the Chief Justice warned recently, the trend threatens to engulf the federal courts. ("I urge Congress to review carefully the impact on the federal courts, and on the traditional balance between state and federal jurisdiction, before adopting the more expansive proposals in the crime bill.") *1993 Year-End Report on the Federal Judiciary.* The Judiciary is not just another subservient agency available to do whatever Congress wishes.

Unless FACE is struck down, the federal courts must accept jurisdiction over a class of criminal cases which in common-law terms need not rise even to the level of a trespass upon property or an assault (understood as less than a battery) upon a person. In analyzing the individual issues, this Court

should consider the arguments within this jurisdictional context. When deferring to congressional intent, federal courts do so as a matter of respect for the principle of separation of powers. That same principle also requires the Judiciary to resist congressional overreaching to confer undue jurisdiction.

FACE involves not only the inadequacy of congressional definition but its very legitimacy. However broadly one might stretch the Commerce Clause in civil matters, its application to criminal matters implicates jurisdictional principles not applicable to civil matters. As *Marbury v Madison*, 1 Cr. (5 U.S.) 137 (1803), reminds us, the most basic use of judicial review has been defensive. Chief Justice Marshall therefore refused to exercise jurisdiction given by Congress, but not by the Constitution. If the jurisdictional dimension of FACE is ignored, the Judiciary may render its institutional integrity defenseless against a flood of federal criminal laws, including domestic violence,[3] drunken driving, assault and trespass, which belong in state court.

II. The Court of Appeals Otherwise Errs

A. The Court of Appeals First Amendment Standard of Review Is Erroneous

The Fourth Circuit uncritically concluded that strict

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[3] E.g., see the proposed "Violence Against Women Act," introduced in the 103d Congress, as part of a federal crime bill, discussed in "A Million Mrs. Bobbitts", *The New York Times*, A26 (January 28, 1994). Abuse of children and female spouses, e.g., is a grievous problem, as to the gravity of which, unlike abortion, there is no serious disagreement. Is domestic relations law to be federalized?

scrutiny is not the standard to apply to FACE. Instead, the Court invoked an intermediate test to determine constitutional validity, based partly upon its determination that the restricted conduct was outside protected speech in many respects. But FACE, according to the Court, did not escape the First Amendment entirely, for it does affect some protected conduct like peaceful protest that obstructs entrances.

The Fourth Circuit determined that FACE is content- and viewpoint-neutral, thus requiring a First Amendment neutrality enquiry that does not focus upon the motive of the protester. "Rather, a statute regulating expressive conduct is neutral if it is justified without reference to the content of the violator's message or point of view. *Madsen v. Women's Health Center*, 114 S. Ct. 2516, 1523-24 (1994); *Ward v. Rock Against Racism*, 491 U.S. 788, 791 (1989). Congressional purpose is the main consideration. *Id.*" App. at 9a-10a. Finally, the Court finds that the Congress chose reasonable regulatory means adapted to legitimate objectives --- namely, stopping violence around abortion clinics.

B. FACE Legislative History Clearly Establishes Applicability Only to Prolife Advocates

At first blush much of FACE seems unambiguous. As its "Purpose", §2, states, Congress is establishing penalties and remedies for conduct intended to injure, intimidate or interfere with persons seeking or providing reproductive services. To understand congressional intent, however, one must scrutinize the language of §248(a)(1) and the legislative history, particularly the word "because." Then it becomes clear: only those who espouse prolife views are targeted.

FACE is written in terms general enough to appear to criminalize First Amendment activities of disparate groups and individuals around abortion clinics. The Fourth Circuit, however, ignored venerable construction standards. The Supreme Court has a long-established way of construing statutes. In *United States v. Turkette*, 452 U.S. 576, 580 (1981), for instance, the Court states that a court should look first at the language. If there is no ambiguity, "in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"

In *INS v. Vardoza-Fonseca,* 480 U.S. 421, 432 n. 12 (1987), the Court added:

> "...clearly expressed legislative intention" contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.

FACE is designed to suppress only the anti-abortion side of a fierce national debate. The legislative history reveals intent that only those who espouse anti-abortion views are at risk.[4] The Fourth Circuit ignored such intent. This failure

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[4] A Department of Justice press release, dated April 11, 1995, received by Counsel May 9, reports the first FACE indictment of a pro-abortion individual. Defendant is said to have been indicted for telephoning two abortion-alternative counseling facilities and threatening in one call "to kill workers at the clinic" and in the other "to shoot prolifer supporters demonstrating outside abortion clinics." The indictment is said to be in two counts: (1) unlawful interstate communication -- obviously not FACE; (2) FACE -- "threat of force to intimidate and interfere with ... workers." The press release does not discuss the fact that FACE legislative history deals solely with activity involving abortion facilities (euphemistically rephrased,

establishes a precedent for spawning innumerable criminal, civil and injunctive FACE actions - all in federal court.

C. FACE Abridges the Freedom of Expression Protected by the First Amendment

1. A Content-specific Statutory Regulation of Expressive Conduct Is Presumptively Unconstitutional and Must Be Subjected to the Most Exacting Scrutiny

Petitioners had urged application of the strict scrutiny articulated in *R.A.V. v. St. Paul,* 112 S. Ct. 2538 (1992), *Boos v. Barry*, 485 U.S. 312 (1988), and other cases involving prohibitions of expressive conduct by reference to the content of the expression. Instead the Circuit Court applied intermediate scrutiny, primarily relying upon *Madsen, supra.*

Madsen concerns a state court injunction against various forms of speech and expressive conduct by prolife protestors in the vicinity of an abortion clinic. In upholding some parts of the injunction and invalidating others, the Court applied a newly unfolded intermediate standard of review, stricter than the standard applicable to a content-neutral restriction of time, place and manner, but not as strict as the standard applicable to a content-specific statute. Although the injunction effectively restricted only prolife expression, the Court rejected the argument that it should be subjected to the rigorous scrutiny appropriate to content-specific statutes

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during the legislative process, as "reproductive health services").

because to apply the statutory test in the injunctive context would make nearly every injunction content- or viewpoint-based. *Id.* at 6.

The scrutiny with respect to statutes which regulate expression by reference to the content of the expression or to the viewpoint expressed is settled beyond serious dispute: an exacting scrutiny. *Boos v. Barry*, 485 U.S. 312 (1988).

FACE, a statute and not an injunction, should not be evaluated by the *Madsen* somewhat unclear intermediate standard. Rather, because it explicitly regulates expressive conduct by reference to content, and implicitly by reference to viewpoint, it must be subjected to the "exacting scrutiny" of *R.A.V.*.and *Boos*, *supra*.

2. FACE Imposes Content-based Restrictions upon Political Expression

Aside from its direct prohibition of certain forms of political expression protected by the First Amendment, FACE clearly is unconstitutional as both a content- and viewpoint-based restriction on political expression.

FACE would be unconstitutional as a content-based restriction even if each expressive act it punishes were deemed outside First Amendment protection because FACE restricts such acts when they are committed "because" of the provision of "reproductive health services" but permits the same acts when committed for other reasons. § 248 (a)(1), (a)(3). People who wish to obstruct access to businesses, schools and hospitals, for any reason or none, may do so with impunity under federal law. The protection of the statute is triggered

only when the target of the obstruction or other prohibited conduct is a provider of "reproductive health services" and the conduct is "because" of such "services."

The actual intent required in FACE, however, is *not* the intent to injure, intimidate or interfere with any person *"who is"* obtaining or providing abortion or other reproductive health services. Rather, the required intent is the intent to injure, intimidate or interfere with any person *"because* that person is obtaining" or providing such services. §248 3(a)(1). [Emphasis supplied.]

Because FACE is content-specific,[5] it is unconstitutional in the absence of a compelling distinction between obstruction and interference by persons objecting to "reproductive health services" and identical obstructions and interferences by environmentalists, labor picketers and others. No such distinction has been advanced, and the "presumption is . . . very strong" that none would bear scrutiny. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring).

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See also Senate Committee Report # 103-117, 103d Congress, 1st Session, at 24 (submitted by Senator Kennedy):

> Thus, for example, if an environmental group blocked passage to a hospital where abortions are performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act. . . . [T]he demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services.

3. FACE Imposes Viewpoint-based Restrictions upon Political Expression

FACE explicitly establishes a content-based restriction upon "obstruction" and similar activities but this is not all. Both its principal purpose and its principal effect are to enact a de facto *viewpoint*-based restriction targeted at anti-abortion protests. This purpose, only implicit in the text, is clear from the context of final enactment and is explicit and pervasive in the legislative history.

Nor should the last-minute legislative substitution of the term "reproductive health services" for "abortion-related services" be regarded as dispositive of the question of viewpoint discrimination. If a political faction, upon obtaining a legislative majority, may effect an otherwise impermissible suppression of the expressive conduct of a particular group of its ideological opponents simply by stretching the list of prohibited viewpoints --- in this case the "because" clause of §248(a)(1) --- so as to encompass one or two hypothetical situations in which somebody other than the targeted group conceivably might be subject to similar suppression, then there is not much left of the prohibition against viewpoint specificity.

FACE is constitutionally indistinguishable from the statute struck down in *R.A.V.*. FACE also contains the objectionable elements of any number of hypothetical statutes which, were they enacted outside the context of the abortion controversy, would be regarded as transparent attempts to suppress particular viewpoints. The FACE formula is designed clearly to help one side in the abortion debate and hurt the other. A statute that does this by punishing expressive conduct, and which limits punishment to conduct which is engaged in

"because" of an event which in the overwhelming majority of actual cases is desired by one side in the debate and opposed by the other, is viewpoint-specific.

FACE makes an impermissible distinction between expressive conduct engaged in by anti-abortion protesters and identical conduct designed to prevent or dissuade people from exercising other constitutional rights. One may obstruct access to public auditoriums, newspapers or the headquarters of right-to-life organizations without falling afoul of FACE. Only "reproductive health services" and the opponents of certain services are singled out.

This Congress may not do. As the Supreme Court observed of the "hate speech" ordinance struck down in *R.A.V.*, the legislature "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." 112 S. Ct. at 2548.

4. FACE Imposes Severe Penalties upon First Amendment Expression

Even if it were not content-based and viewpoint-based, FACE would be unconstitutional because it imposes penalties upon various forms of nonviolent political expression. Although some forms of expression arguably are outside First Amendment protection, others are squarely within that scope.

FACE subjects a person who "interferes with or attempts to . . . interfere with" another person who is or has been obtaining or providing abortion-related services when the offender's conduct is "exclusively a nonviolent physical obstruction" to a fine up to $10,000 and imprisonment up to six months, for the first offense; 18 months and $25,000 for a

subsequent offense.

The congressional debate on FACE is replete with explicit references to the psychological and emotional "injuries" that may be caused by listening to a message one does not want to hear. See, e.g., 139 Cong. Rec. S15671 (Daily ed, November 16, 1993) (statement of Senator Feinstein).

Finally, FACE prohibits particular forms of symbolic speech that are uniquely powerful in the context of the abortion debate. It does so, moreover, in a context that suggests that the prohibition is at least partly *because* of this expressive content.

Punishment of nonviolent political expression strikes at the very heart of the First Amendment. When, as here, the punishment is at least in part *because* of the communicative nature of the conduct, the law in question must be subjected to "the most exacting scrutiny." *Texas v. Johnson,* 491 U.S. 397, 412 (1989), quoting *Boos,* 485 U.S. at 321. See also *United States v. O'Brien,* 391 U.S. 367 (1968).

5. FACE Is Substantially Overbroad and Unconstitutionally Vague

The terms "vagueness" and "overbreadth" are used to describe several distinct sorts of constitutional defect. Some of the constitutional commands that can be transgressed by a vague and/or overbroad statute regulating expression are grounded in the fair notice requirement of the Due Process Clause of the Fifth Amendment. Others are inherent in the First Amendment protection of freedom of expression. See generally Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853 (1991). FACE contains several of these defects.

To the extent FACE defines conduct which is the legitimate object of regulation, it does so "by means that sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 307 (1964).

The blanket criminalization of verbal "threats" also appears to be overbroad. The Supreme Court repeatedly has held that threats in the context of a political dispute may be punished only when they are "directed to inciting or producing imminent lawless action, and [are] likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969); see also *Claiborne,* 458 U.S. at 927. Cf. *Wurtz v. Risley,* 719 F. 2d 1438 (9th Cir., 1983) (statute proscribing "intimidation," defined to include "a threat to . . . commit any criminal offense," was overbroad).

FACE has an impermissible chilling effect. A straightforward reading of key provisions reveals that they may be violated by the very things prolife protestors and counsellors try to do every day on the streets and sidewalks outside clinics. And, if narrowed, FACE yet would be unconstitutionally vague.

6. FACE Impermissibly Requires Payment of Damages for Commercial Injuries Caused in Whole or in Part by First Amendment Expression

Even if FACE did not directly punish protected expression or discriminate against expression on the basis of content and viewpoint, and even were it not vague and overbroad, its statutory damages provision would fail. This provision not only allows for the recovery of damages by abortion providers against peaceful prolife demonstrators who

may have stepped outside the bounds of constitutional protection; it specifically provides that the abortion providers may recover such damages *without* proving that they were incurred on account of the demonstrators' constitutionally unprotected conduct. § 248(c)(1)(B).

Claiborne holds that where damages may have been caused by a course of conduct which included both expressive conduct protected by the First Amendment and unprotected conduct such as violence and threats of violence, damages may be assessed (1) only against defendants shown to (i) have engaged in unprotected conduct or (ii) specifically intended to further the illegal aims of such conduct; and (2) *only* in an amount sufficient to compensate for the injuries shown to have been caused by the unprotected conduct. 458 U.S. at 916-920. Moreover, proof of the amount of damages attributable to the unprotected conduct must be with "precision." *Id.* at 916.

Indeed, FACE goes even further than the Mississippi law struck down in *Claiborne.* Not only does the clinic owner not have to prove with "precision" how much of his damages were caused by the unprotected acts rather than by his opponents' exercise of their right to free speech, he can recover the $60,000 even if it is proved affirmatively that the entire economic injury was attributable to the constitutionally protected activity! For instance, the owner could still opt to receive the $60,000 "at any time prior to the rendering of final judgment" even if every woman who had canceled her abortion appointment on the day of the demonstration testified at trial that she had changed her mind because she was impressed by the demonstrators' sincerity and the force of their arguments, not because of physical obstruction.

D. FACE Violates the Free Exercise

Clause and the Religious Act By Targeting Religious Beliefs and Practices

1. FACE Violates Appellants' Rights under the Free Exercise Clause

The conflict between abortion rights groups and prolife religious groups is bitter because it arises from a dispute about the most fundamental question of life. Although abortion advocates may be free to secure the enactment of their own views into law without violating the Establishment Clause, their attempt through FACE to suppress the religiously motivated expression and conduct of their opponents does violate the Free Exercise Clause. As the Supreme Court recently observed, a free exercise claim may present itself "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices." *Church of Lukumi Babalou Aye v Hialeah,* 113 S. Ct. 2217, 2234 (1993).

The law need not explicitly target religious beliefs to violate the Free Exercise Clause. Rather, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral..." *Id.* The text alone is not controlling. In *Lukumi,* the Court "reject[s] the contention. . . .that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative." *Id.*.

The motive requirement has the effect of exempting other similar but politically acceptable acts, as is revealed in the legislative history which distinguishes and exempts environmental protestors who may block hospital entrances.

In *Lukumi,* the targeted conduct is a religious ritual. The Free Exercise Clause is not limited to protection of religious ritual. Rather, *Lukumi* repeatedly uses the term "religious practice."

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." 113 S. Ct. at 2233. FACE is subject to strict scrutiny if it fails on either count: neutrality or general applicability. It fails on both counts. As in most strict-scrutiny cases, Appellee cannot establish a compelling reason to justify this particularly worded law.

2. FACE Violates the Religious Act

Quite apart from the neutrality and general applicability requirements of the Free Exercise Clause, FACE violates the Religious Act, 42 U.S.C. §§2000bb, *et seq*, which affords Appellants even greater protection than would be afforded by the Court's constitutional holdings. Dissatisfied with *Employment Division v. Smith,* 494 U.S. 872 (1990), Congress has "provide[d] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. §2000bb(b)(2). The Religious Act applies even to neutral laws of general applicability. *See* §2000bb(a)(1), Findings.

The Religious Act provides protection to the free exercise of religion broader than the Constitution requires. The statute prescribes that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided . . ." 42 U.S.C. § 2000bb-1(a). As demonstrated in the previous section, FACE does substantially burden Appellants' exercise

of religion by threatening them with arrest, prosecution and punitive damages for engaging in religious acts of mercy.

An exception to the Religious Act allows imposititon of a substantial burden "only [upon demonstration] that the application of the burden to the person - 1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at §2000bb-1(b). Thus, the Religious Act also goes further than the Constitution in that a compelling governmental interest is not sufficient. The Government must demonstrate that it has used the least restrictive means.

III. The Questions Presented Are Important

FACE has triggered seventeen additional cases. Media reports suggest others. This and one other currently seek certiorari.[6] Upon information and belief, others are in the appellate process. Over time, notwithstanding the widespread FACE-induced free speech/religious rights chill, there

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The other is *Woodall v. Reno*, 47 F.3d 656 (4th Cir. 1995); argued following the instant case; subject of a two-page opinion referring to the instant case for its rationale. No Commerce Clause/federalism issue is raised in *Woodall*. Appellants there filed for certiorari under date of February 21, 1995, claiming to be "the first Court of Appeals decision on FACE . . ." Petition for Writ of Certiorari, #94-1417, page 1. In fact, the instant case is the first FACE case filed; the first to receive a full trial court opinion; the first argued and adjudicated upon appeal; the first and only to receive a full appellate opinion; and the first to be dismissed upon all counts with prejudice. The *Woodall* Answer of the Solicitor General is due on or about June 1, 1995. *Woodall* and the case at bar are materially different. Only Petitioners herein raise the Commerce Clause/federalism issue. Only Petitioners are fully dismissed with prejudice.

undoubtedly will be a widening flow of FACE criminal, civil and injunctive cases, eventually inundating state and local police power. Until and unless this honorable Court enunciates the constitutional criteria applicable to FACE, and, if need be, the standard of scrutiny, while untold law-abiding citizens will refrain from speech perceived to be unlawful, many others will follow their faith and hope; and the Federal Judiciary will become the police courts of local America.

CONCLUSION

For the foregoing reasons, Petitioners American Life League, Inc. And the individual Petitioners pray that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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May 12, 1995

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN LIFE LEAGUE, INCORPORATED; DAVID G. P. ENGLEFIELD; PATRICIA LOHMAN; GERALD WEYMES, Reverend; ANTOINETTE C. CLEARY; PATRICIA SAVINO,

Plaintiffs-Appellants,

v.

JANET RENO; NATIONAL ABORTION FEDERATION; COMMONWEALTH WOMEN'S CLINIC; CAPITOL WOMEN'S CENTER, INCORPORATED; GEORGE TILLER, Doctor; SUSAN WICKLUND, Doctor; NATIONAL ORGANIZATION FOR WOMEN,

Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA,

Amici Curiae.

No. 94-1869

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-94-700-A)

Argued: November 3, 1994

Decided: February 13, 1995

Before HALL and MICHAEL, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Hall and Senior Judge Chapman joined.

COUNSEL

ARGUED: Marion Edwyn Harrison, LAW OFFICES OF MARION EDWYN HARRISON, Falls Church, Virginia, for Appellants. Mark L Levy, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Deborah A. Ellis, NOW LEGAL DEFENSE AND EDUCATION FUND, New York, New York, for Appellees. **ON BRIEF:** Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Mark B. Stern, Jonathan R. Siegel, Civil Division, Deval L. Patrick, Assistant Attorney General, William R. Yeomans, Counsel to the Assistant Attorney General, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Martha F. Davis, NOW LEGAL DEFENSE AND EDUCATION FUND, New York, New York; Catherine Albisa, CENTER FOR REPRODUCTIVE LAW & POLICY, New York, New York, for Appellees. Catherine Weiss, Louise Melling, Karen Leiter, Reproductive Freedom Project, Steven R. Shapiro, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Stephen B. Pershing, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, Richmond, Virginia, for Amici Curiae.

OPINION

MICHAEL, Circuit Judge:

Plaintiffs, the American Life League, Inc. and five individuals, all actively opposed to abortion, appeal from a judgment upholding the validity of the Freedom of Access to Clinic Entrances Act of 1994 (the Access Act or Act), Pub. L. No. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248). We affirm.

In affirming we first conclude that the Access Act is within the commerce power of Congress and that congressional action here was

not barred by principles of federalism. Second, we decide that the Act does not violate the First Amendment's Free Speech Clause. The Act targets unprotected activities, such as violence and clinic blockades. However, to the extent that the Act might incidentally proscribe some conduct with expressive elements (such as peaceful but obstructive picketing), we examine it under the First Amendment. Because we find that the Act is content and viewpoint neutral, we subject it to intermediate scrutiny. Under that level of scrutiny we conclude that the Act serves substantial government interests, that it is not aimed at expression, and that it is narrowly tailored. We also conclude that the Act is neither overbroad nor vague. The Act's liquidated damages provision also withstands the First Amendment challenge. Third, we conclude that the Act does not violate the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4.

I.

On May 26, 1994, the same day the President signed the Access Act into law, plaintiffs filed this action to challenge it in the United States District Court for the Eastern District of Virginia.

Plaintiffs allege the following in their second amended complaint. Plaintiff American Life League, Inc. (ALL) conducts educational and legislative activities "relating to the human rights of persons born and unborn." The five individual plaintiffs, Antoinette C. Cleary, David G. P. Englefield, Patricia Lohman, Patricia Savino and the Reverend Gerald Weymes, all oppose abortion "upon theological, moral and other grounds." The Reverend Mr. Weymes has often prayed near clinics that perform abortions. The other individual plaintiffs and some ALL members have "demonstrated, prayed and sidewalk-counseled within the vicinity of abortion clinics." Plaintiffs' activities have been peaceable, and they do not condone "nonpeaceable or violent conduct." Their actions, however, have physically obstructed access to abortion clinics.

Plaintiffs also allege that their continuing anti-abortion activities put them in jeopardy of violating the Access Act. They claim that the Act, by outlawing their activities, violates the Constitution and RFRA.

Plaintiffs brought this action against Janet Reno, Attorney General of the United States. The district court allowed five additional defendants to intervene: the National Abortion Federation; the National Organization for Women; Commonwealth Women's Clinic and Capitol Women's Center, two reproductive health clinics that provide counseling, birth control advice, contraceptives, medicine, pre-natal care and abortions; and Dr. George Tiller and Dr. Susan Wickland, two physicians who perform abortions. The district court accepted (as did we) an *amicus* brief from the American Civil Liberties Union and the ACLU Foundation of Virginia.

On June 1, 1994, five days after the complaint was filed, the Attorney General filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court acted with dispatch, holding a hearing on June 10, 1994, and issuing an opinion and order dismissing the second amended complaint with prejudice on June 16, 1994. *See American Life League, Inc. v. Reno*, 855 F. Supp. 137 (E.D. Va. 1994). Plaintiffs now appeal that order.

II.

Congress passed the Access Act in response to protracted and nationwide violence and access obstruction at facilities providing abortions. Between 1977 and early 1993, more than 1,000 acts of violence against abortion providers and more than 6,000 clinic blockades were reported in the United States. S. Rep. 117, 103d Cong. 1st Sess. 31 (1993); H. R. Rep. No. 306, 103d Cong. 2d Sess. 6-7 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699, 703. "These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder." *Id.* Congress concluded that state and local law enforcement agencies were often unable and sometimes unwilling to protect the patients and staffs of these clinics from violence and severe disruption. S. Rep. No. 117 at 3, 18-21; H. R. Rep. No. 306 at 10.

The Access Act aims to protect and promote public safety and health "by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking

to obtain or provide reproductive health services." Act, § 2. To that end the Act provides criminal and civil penalties against anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . . .

Act, § 3(a).[1]

The Access Act defines its key terms. Act, § 3(e). The term "interfere with" means "to restrict a person's freedom of movement." "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services . . . , or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." "Reproductive health services" means "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."

The Act also provides a rule of construction: "[n]othing in this section shall be construed — (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) pro-

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[1]The Act also prohibits the same activities if directed at (i) any person lawfully exercising or seeking to exercise the right of religious freedom at a place of religious worship or (ii) the property of a place of religious worship. Act, § 3(a). Those portions of the Act are not at issue in this case.

tected from legal prohibition by the First Amendment to the Constitution." Act, § 3(d).

The criminal penalties prescribed by the Act vary with the nature of the violation. For example, a first offense involving only a nonviolent physical obstruction carries a penalty of imprisonment for not more than six months or a fine of not more than $10,000. An offense resulting in death carries a penalty of imprisonment for any term of years or for life. Act, § 3(b).

The civil remedies prescribed by the Act include injunctive relief, compensatory or statutory damages ($5,000 per violation), punitive damages, and costs and fees. Act, § 3(c). These civil remedies are available to any person injured in providing or obtaining services at a reproductive health facility. Finally, the Act also authorizes civil actions by the Attorney General of the United States or any State Attorney General. *Id.*

We turn now to plaintiffs' several challenges to the Act.

III.

A.

As a threshold matter plaintiffs argue that Congress lacks the power to pass the Access Act. The Act identifies the Commerce Clause and section 5 of the Fourteenth Amendment as the sources of congressional power in this instance. Act, § 2. We conclude that the commerce power permits Congress to regulate activities affecting reproductive health services. As a result, we need not reach plaintiffs' argument that section 5 of the Fourteenth Amendment does not provide Congress with authority.

A federal statute is valid under the Commerce Clause if Congress (1) rationally concluded that the regulated activity affects interstate commerce and (2) chose a regulatory means reasonably adapted to a permissible end. *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 276 (1981).

Based on an extensive legislative record, Congress rationally concluded that violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce. Congress marshaled, among others, the following facts to establish the interstate connection. Many women travel across state lines to seek reproductive health care. S. Rep. 117, 103d Cong. 1st Sess. 31 (1993); H. R. Conf. Rep. No. 488, 103d Cong. 2d Sess. 7 (1994) *reprinted in* 1994 U.S.C.C.A.N. 724. Reproductive health facilities engage doctors and other staff in an interstate market. For example, Dr. David Gunn, who was murdered in Florida in 1993, performed abortions in several states. S. Rep. No. 117 at 3; H. R. Rep. No. 306, 103d Cong. 2d Sess. 6-7 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699, 704. These facilities buy medical and office supplies that move in interstate commerce. S. Rep. No. 117 at 3; H. R. Conf. Rep. No. 488 at 7. "[C]linics have been closed because of blockades and sabotage and have been rendered unable to provide services." S. Rep. No. 117 at 31. From these facts Congress concluded that interstate commerce was threatened. S. Rep. No. 117 at 31; H. R. Rep. No. 306 at 8-9.

Congress also chose regulatory means reasonably adapted to permissible ends. The Act's criminal and civil penalties are designed to deter violent, obstructive and destructive conduct. The penalties are reasonably adapted to the Act's following permissible ends: (1) protecting the free flow of goods and services in commerce, (2) protecting patients in their use of the lawful services of reproductive health facilities, (3) protecting women when they exercise their constitutional right to choose an abortion, (4) protecting the safety of reproductive health care providers, and (5) protecting reproductive health care facilities from physical destruction and damage.

Together, these findings, these means and these objectives are more than ample to justify Congress's invocation of the commerce power. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

B.

In a final, brief subpoint under their argument that "there is no constitutional authority for [the Access Act]," plaintiffs urge us to reject

the Act as an unwarranted "incursion upon federalism and the federal judiciary." Brief for Appellants at 39, 44. First, plaintiffs suggest that any public safety problems at reproductive health facilities should be handled under existing state laws. Second, they express concern that the Access Act gives federal courts "undue jurisdiction" and will add a flood of new cases to already crowded federal dockets. We must reject these arguments. Congress, not the courts, determines the need for new federal laws. And Congress, subject only to Article III of the Constitution, establishes the jurisdiction of the inferior federal courts. *See, e.g., Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850).

IV.

A.

The Constitution ordains that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. Plaintiffs claim that the Access Act abridges this freedom.

We begin our consideration of plaintiffs' freedom of speech claims by repeating the elements of a basic offense under the Act. A violator must (1) "by force or threat of force or by physical obstruction," (2) "intentionally injure[ ], intimidate[ ], or interfere[ ] . . . with any person," (3) "because that person [the victim] is . . . obtaining or providing reproductive health services." Act, § 3(a).

The government's first defense is that the Act does not implicate the First Amendment at all; rather, it regulates conduct that is outside the First Amendment. According to the government, the Act leaves plaintiffs free to engage in any form of protected speech they choose.

In many respects the government is correct. The Access Act does not prohibit protestors from praying, chanting, counseling, carrying signs, distributing handbills or otherwise expressing opposition to abortion, so long as these activities are carried out in a non-violent, non-obstructive manner. What the Act does prohibit is force, the threat of force and physical obstruction intended to deprive someone of the lawful right to use or provide reproductive health services.

The use of force or violence is outside the scope of First Amendment protection. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993) ("a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). True threats of force also lie outside the First Amendment. *Watts v. United States*, 394 U.S. 705, 707 (1969) (holding that "[w]hat is a threat must be distinguished from what is constitutionally protected speech"); *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546-47 (1992). Finally, certain physical obstructions, such as a blockade of pedestrian traffic, are not protected by the First Amendment. *See Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (holding that a statute which prohibited unreasonable interference with access to a courthouse was a "valid law . . . and the fact that free speech is intermingled with such conduct does not bring with it constitutional protection").

Thus, the Act does target unprotected activities. But the Act cannot escape First Amendment scrutiny entirely. The Act might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing. The right to peaceful protest lies near the heart of the freedom of speech. Accordingly, we examine the Act under the First Amendment.

B.

The first step in our First Amendment inquiry is to determine whether the Act is content and viewpoint neutral. Plaintiffs argue that the Act is a content- or viewpoint-based restriction because it outlaws conduct for its anti-abortion message. If plaintiffs are correct, then we subject the Act to strict scrutiny. To pass this test a law must be necessary to serve compelling governmental interests by the least restrictive means available. *See, e.g., R.A.V.*, 112 S. Ct. at 2549-50 (1992); *Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992) (plurality). If plaintiffs are incorrect, if the Act is content and viewpoint neutral, then we subject it to intermediate scrutiny. To pass this test a law must be narrowly tailored to serve substantial governmental interests. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The neutrality inquiry does not focus on the motive of the violator. Rather, a statute regulating expressive conduct is neutral if it is justi-

fied without reference to the content of the violator's message or point of view. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2523-24 (1994); *Ward*, 491 U.S. at 791. Congress's purpose is the main consideration. *Id.*

The Access Act identifies its purpose in plain language:

> the purpose of this Act [is] to protect and promote public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services.

Act, § 2. The Act also includes rules of construction:

> Nothing in this section shall be construed—
>
> (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;
>
> (2) to create any new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed . . . .

Act, § 3(d). Together, the Act's statement of purpose and rules of construction indicate that the Act was not passed to outlaw conduct because it expresses an idea. Instead, Congress passed the Act to promote public safety and health and to protect interstate commerce from disruption.

Plaintiffs insist that these lofty statements of purpose and construction are subterfuge. They say Congress really intended to "suppress only the anti-abortion side of a fierce national debate." Brief for Appellants at 8. This argument ignores the Act's substantive provi-

sions. These unambiguous provisions do not target any message based on content or viewpoint.

The Act protects reproductive health services and those who use and provide them. Reproductive health services embrace "medical, surgical, counseling, or referral services relating to the human reproductive system." Act, § 3(e). The Act thus protects access to all reproductive health services, including both abortion and services connected with carrying a fetus to term. It applies, for example, to facilities opposing abortion and to facilities offering pregnant women counseling about alternatives to abortion. For example, AAA Women for Choice, Inc., a facility run by plaintiff Patricia Lohman, would be protected. AAA Women for Choice offers "counsel, comfort and alternatives other than abortion to pregnant women." Second Amended Complaint at ¶ 6.

Moreover, the Act punishes anyone who engages in the prohibited conduct. For example, anyone who, with the requisite intent, blocks a person from entering a facility to obtain or provide reproductive health services violates the Act. The viewpoint of the obstructer is irrelevant. The Act forbids the obstructive conduct not because of the content of any message that conduct might convey, but because of its harmful effects.

Plaintiffs press on and say that the Act's apparent neutrality is not enough. They charge that the inclusion of protection for anti-abortion services is a ruse to make the Act look neutral. In reality, they argue, the Act aims to suppress the anti-abortion movement. They note that one is a wrongdoer under the Act only when he commits the proscribed conduct *because* the victim is obtaining or providing reproductive health services. The "because" element is the Act's Achilles's heel, according to plaintiffs. They say only people who oppose abortion will be punished under the Act; those who protest at reproductive health facilities for reasons unrelated to the abortion issue will never violate the law. As examples, plaintiffs say those protesting at clinics on labor and environmental issues would not violate the Act. On this basis plaintiffs conclude that the Act is aimed at their motives for protesting and thus at their message and its viewpoint.

This lack-of-neutrality argument overlooks the distinction between what the Act does and does not regulate. Again, the Act does not pro-

hibit peaceful protestors from praying, chanting, counseling, carrying signs, distributing handbills, or otherwise expressing their opposition to abortion. What the Act does prohibit is force, the threat of force, and physical obstruction, when carried out because a person is using or providing reproductive health services. The "because" or motive element does not render the Act content or viewpoint based. As we explain below, the Act's motive requirement simply narrows its reach, and this narrowing is within congressional prerogative.

In *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), the Supreme Court upheld a Wisconsin law that enhanced the sentence for the crime of aggravated battery when the defendant intentionally selected his victim *because* of the victim's race. Just like plaintiffs here, the defendant argued that he was being punished for his motive for acting. The unanimous Supreme Court rejected that argument, saying "[m]otive plays the same role under the Wisconsin statute as it does under the federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge." *Id.* at 2200. The Court reasoned that "the penalty-enhancement statute [was] aimed at conduct unprotected by the First Amendment." *Id.* at 2201. Thus, Wisconsin's statute did not target conduct on the basis of its expressive elements. *Mitchell*'s conclusion was consistent with the Supreme Court's prior recognition that "where government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546-47 (1992).

As the Supreme Court observed in both *Mitchell* and *R.A.V.*, the distinction between targeting the expressive elements of conduct and targeting the proscribable elements of conduct undergirds many federal laws. For example, Title VII includes a motive requirement. Title VII makes it unlawful for an employer to discriminate against an employee "*because* of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Supreme Court has held that Title VII does not infringe an employer's First Amendment rights. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Another example is a provision in the Fair Housing Act that prohibits using force or the threat of force to injure, intimidate, or interfere with a person "*because*" he is participating in certain housing programs. 42 U.S.C. § 3631 (emphasis added). That provision,

despite its motive requirement, has been upheld as a content- and viewpoint-neutral regulation. *United States v. Hayward*, 6 F.3d 1241, 1249-51 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994); *United States v. Gilbert*, 813 F.2d 1523, 1529-31 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).[2]

Thus, Congress may enact laws to punish proscribable conduct even though the conduct is motivated by certain biases or beliefs. More important for this case, Congress can exercise its prerogative to single out and address "conduct thought to inflict greater individual and societal harm" by using a motive requirement to narrow the reach of a law. *Mitchell*, 113 S. Ct. at 2201; *see FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2102-03 (1993). Indeed, in passing the Access Act Congress determined that intentional interference with access to reproductive health services is more damaging to federal interests than activity that affects such access only incidentally, *e.g.*, labor or environmental protesting. We repeat, Congress may choose to legislate only against actions it considers to be more serious. Moreover, a statute is not rendered non-neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct. *See United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War).

For these reasons, we find that the Access Act is content and viewpoint neutral. The Act is justified without reference to the violator's viewpoint or the content of his message. Therefore, we subject the Act to intermediate scrutiny.

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[2]*See also, e.g.*, 18 U.S.C. § 245(b) (making it a crime to use "force or threat of force [to] willfully injure[ ], intimidate[ ], or interfere[ ] with . . . any person *because*" that person is voting or working for the federal government) (emphasis added); and 42 U.S.C. § 1971(b) (Voting Rights Act) (providing that no person "shall intimidate, threaten, [or] coerce . . . *for the purpose of* interfering with" a person's right to vote) (emphasis added).

C.

Intermediate scrutiny is required when a statute potentially regulates conduct that has protected expressive elements. The intermediate scrutiny test was first enunciated by the Supreme Court in *O'Brien*.

O'Brien was convicted under a federal statute which made it a crime to destroy a draft card knowingly. In the Supreme Court O'Brien argued that his "act of burning his [draft card] was protected 'symbolic speech' within the First Amendment." *O'Brien*, 391 U.S. at 376. The Supreme Court upheld the conviction, noting that Congress could regulate conduct that has an expressive element, given sufficient justification:

> even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a [draft card] is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id. The Court then laid down a test for reviewing a statute, such as the Access Act, that may incidentally affect speech as it regulates conduct. Under *O'Brien*'s test such a statute passes constitutional muster "if it [1] furthers an important or substantial governmental interest; if [2] the governmental interest is unrelated to the suppression of free expression; and if [3] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

1.

O'Brien's first prong asks whether the Act furthers important or substantial government interests. For easier discussion we group the several interests suggested by the government.

One group relates to protecting public health, safety and commerce. This interest includes protecting patients and staff from violence and harm and protecting reproductive health facilities from physical destruction or damage. It also includes protecting interstate patient traffic and the interstate market for the services of doctors, nurses, counselors, and other staff.

A second group of interests relates to protecting women and men from violence and threats in the exercise of their rights. The Supreme Court has recognized that government "has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2526 (1994). This freedom includes the constitutional right to terminate a pregnancy. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Also, both women and men have the constitutional right to obtain and use contraceptives. *See Eisenstadt v. Baird*, 405 U.S. 438, 440, 446 (1972); *Casey*, 112 S. Ct. at 2807. They should be able to use reproductive health facilities to exercise this right.

Together, or separately, these interests are significant. The government has a substantial interest in acting to protect them, as Congress did by passing the Access Act.

2.

O'Brien next asks whether the government's interests relate to suppressing free expression. This analysis is essentially the same as the content- and viewpoint-neutrality test we applied earlier. *See* IV.B., *supra*. We concluded that the Act was justified without reference to the message or viewpoint of anyone who might violate it. Relying on the Act's plain language, we also noted that its purpose was not related to suppressing expression. Instead, we found that the Act outlawed certain actions because of their harmful effects. We next rejected plaintiffs' contention that the Act's avowed purpose shrouded an illicit purpose. We believe this analysis is sufficient for the Act to pass the second prong of the *O'Brien* test.[3]

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[3]We add a comment here about the government's acknowledgment that "the national campaign of violent and obstructive pro-life protests

3.

Under *O'Brien*'s third prong we consider whether the incidental restriction on alleged First Amendment freedoms is no greater than required to meet the government's interests. This has been interpreted as a requirement for "narrow tailoring." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The statute must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

The Act meets this standard. Much of the conduct (force and violence) outlawed under the Act lacks any protected expressive element at all. Of course, peaceful but obstructive protesting, which plaintiffs argue has expressive elements, could run afoul of the Act. For example, protesters blocking a clinic door as they pray might violate the Act's prohibition on physical obstruction. However, such a violation would be simply a consequence of the government's lawful aim to protect access to reproductive health services. And the Act proscribes no more expressive conduct than necessary to protect safe and reliable access to reproductive health services. After all, the Act leaves open ample alternative means for communication. In a non-violent, non-obstructive manner, protestors may still stand outside reproductive health facilities and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means.[4]

4.

In sum, the Access Act serves substantial government interests such as preventing violence, preserving public access to reproductive health services, and protecting citizens in their exercise of constitu-

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was the catalyst that led to passage of the Act." Brief for Appellee United States at 22 n.7. This acknowledgment does not mean that Congress acted to curb protected expression. Protecting reproductive health facilities, patients, and providers is a legal purpose, unrelated to suppressing free expression.

[4]Our conclusion that the Act is narrowly tailored is also supported by the reasoning that compels us not to apply the overbreadth doctrine. *See* IV.D., *infra.*

tional rights. It is not aimed at expression, and it is narrowly tailored. It passes *O'Brien*'s test.

D.

Plaintiffs next assert that the Act is unconstitutionally overbroad and vague. They claim that "[t]housands of persons who daily engage in peaceful activities around abortion clinics now risk arrest [and] prosecution" for exercising their First Amendment rights. Brief for Appellants at 29. They specifically point to "sign-carrying . . . and rosary-carrying processions outside clinics." *Id.* at 28. Plaintiffs' argument is this: the Act's alleged overbreadth and vagueness will have a "chilling effect" on such activities.

As for overbreadth, "[o]nly a statute that is substantially overbroad may be invalidated on its face." *Houston v. Hill*, 482 U.S. 451, 458 (1987) (citations omitted). Such an invalid statute proscribes so much protected speech that it must be struck down entirely. Accordingly, the overbreadth doctrine is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Even though the Act might be applied to some protected expression, such as peaceful picketing, that picketing would be prohibited only in the most narrow and justifiable circumstances. Under the Act, "physical obstruction" involves intentionally "rendering impassable ingress or egress from a facility . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." Act, § 3(e)(4). Thus, it is difficult to see how the Act is substantially overbroad in relation to its legitimate scope of outlawing violence and barriers to access.

The vagueness doctrine is concerned with clarity. A statute is unconstitutionally vague if it does not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . ." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine protects both free speech and due process values.

The Access Act's anti-obstruction provisions closely resemble a statute the Supreme Court upheld against a vagueness challenge in *Cameron v. Johnson*, 390 U.S. 611 (1968). In *Cameron* arrested civil

rights protestors challenged Mississippi's Anti-Picketing Law, which provided:

> 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises . . . .

Id. at 613. The Supreme Court rejected the vagueness challenge on the grounds that the terms "obstruct," "unreasonably" and "interfere with" were perfectly clear, widely used, and well understood. According to the Court, the statute "precisely delineates its reach in words of common understanding." *Id.* at 616.

Like the Anti-Picketing Law upheld in *Cameron*, the Act here speaks in clear, common words. Moreover, the Act goes beyond the statute in *Cameron* by defining many of its terms. The Act defines "interfere with" to mean "restrict a person's freedom of movement." Act, § 3(e)(2). It defines "intimidate" to mean "place a person in reasonable apprehension of bodily harm . . . . " Act, § 3(e)(3). These and other narrowing definitions in the Act should inform those opposed to abortion that they will not offend this law by peaceful, nonobstructive picketing.

We conclude that the Access Act is neither overbroad nor vague.

E.

Plaintiffs' final freedom of expression challenge to the Access Act concerns a civil damage provision. The Act authorizes injured persons to file private actions, and it permits them to elect to recover $5,000 per violation in lieu of actual damages. Act, § 3(c). Plaintiffs claim that this damage provision is unconstitutional under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Specifically, plaintiffs say that under *Claiborne Hardware* only *actual* damages caused by unprotected conduct may be recovered. But that is not what *Claiborne Hardware* says. *Claiborne Hardware*

involved a money judgment imposing joint and several liability against ninety-two participants in a mass boycott of white-owned businesses. The Supreme Court addressed whether all members of the group could be held liable for the violent acts of a few. "Civil liability may not be imposed merely because an individual belonged to a group," the Court said. *Id.* at 920. The Court did not consider what the constitutional measure of damages might be after a defendant was found liable for an unprotected act.

The Act here does not subject anyone to damages caused by protected expression. It does subject violators to limited liquidated damages for unprotected conduct. We know of no rule prohibiting a liquidated damages provision that may in a particular case impose more than actual damages for unprotected activity.[8]

V.

Plaintiffs' last claims concern protections afforded religion. Specifically, they argue that the Access Act offends the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4.

A.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The clause forbids government from adopting laws designed to suppress religious belief or practice. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, 2222 (1993). However, a neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990).

Relying on *Church of Lukumi Babalu Aye*, plaintiffs claim that the Access Act violates the Free Exercise Clause. They say it aims to

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[8]The reasonableness of the amount ($5,000) of the liquidated damages per violation is not at issue here.

restrict nonviolent protest because of the protestors' religious motivation. In *Church of Lukumi Babalu Aye* the Supreme Court examined city ordinances aimed at suppressing the Santeria religion. The ordinances prohibited ritual animal slaughter, a Santeria religious practice. The ordinances carefully outlawed *only* animal sacrifice and the possession of animals for sacrificial purposes. They did not outlaw hunting, fishing, or the killing of animals for food. In short, the ordinances accomplished a religious gerrymander. They singled out religious practices for discriminatory treatment. The Supreme Court subjected the ordinances to the same level of exacting (strict) scrutiny it applies to content-based restrictions on speech. *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2233-34. The ordinances were held unconstitutional.

By contrast, the Access Act punishes conduct for the harm it causes, not because the conduct is religiously motivated. *See* IV.B., *supra*. By necessity, then, the Act does not punish religious belief. It proscribes violent, forceful or threatening conduct without regard to expressive content or viewpoint. *See* IV.B., *supra*. Under the Act it makes no difference whether a violator acts on the basis of religious conviction or temporal views. The same conduct is outlawed for all. Therefore, the Act is a generally applicable law, neutral toward religion. It does not offend the First Amendment's Free Exercise Clause.

B.

The Religious Freedom Restoration Act (RFRA) mandates that government shall not "substantially burden a person's exercise of religion" unless the government demonstrates that the burden furthers a "compelling governmental interest" by the "least restrictive means." 42 U.S.C. § 2000bb-1.

The Access Act and RFRA were passed by the same Congress, but RFRA was passed first. RFRA's rule of construction says that federal statutes enacted after RFRA are subject to its provisions unless the later statute "explicitly excludes [RFRA's] application by reference to [the RFRA statute]." *Id.* at § 2000bb-3(b). The Access Act does not exclude RFRA's application, so we examine plaintiffs' claim that the Access Act violates RFRA.

The threshold inquiry under RFRA concerns burden. If a statute does not substantially burden a religious practice, then the statute does not implicate RFRA.

Plaintiffs' complaint alleges that they do not "condone . . . non-peaceable or violent conduct." Accordingly, a proscription on violence and force cannot substantially burden their religious exercise. However, plaintiffs' complaint also alleges that their opposition to abortion (on religious grounds) requires them to obstruct physically, through peaceful picketing, access to clinics offering abortion services. We will assume that this allegation, coupled with plaintiffs' assertion that the Access Act violates their RFRA rights, satisfies their obligation to plead a substantial burden on their religious exercise. *See* Fed. R. Civ. P. 8. This requires us to move to RFRA's next level: an examination of whether the alleged substantial burden imposed by the Access Act furthers a "compelling governmental interest" by the "least restrictive means" available.

We begin with some background. Congress passed RFRA as a response to *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1989). The "findings" section of RFRA states that *Smith* "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a). The "purpose" section adds that RFRA aims "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *Id.* at § 2000bb(b).[6]

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[6]RFRA contemplates that courts will rely on cases decided prior to *Smith* when applying the statute's compelling interest standard. *See* 42 U.S.C. § 2000bb(a)(5) (finding that the "compelling interest test as set forth in prior Federal court rulings [prior to *Smith*] is a workable test"); S. Rep. 111, 103d Cong. 1st. Sess. 8 *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 (noting that the "committee expects that courts will look to free exercise cases decided prior to *Smith* for guidance"); *id.* at 9 (stating that "the compelling interest generally should not be construed more stringently or more leniently than it was prior to *Smith*") (footnote omitted).

In *Sherbert* South Carolina denied unemployment benefits to a Seventh-day Adventist fired for refusing to work on her Sabbath. The Supreme Court reversed. It found uncompelling South Carolina's asserted interest in deterring "unscrupulous claimants feigning religious objections to Saturday work." *Sherbert*, 374 U.S. at 407. In *Yoder* Wisconsin convicted three Amish parents for refusing to send their children to school beyond the eighth grade. Wisconsin's highest court reversed the convictions, and that result stood in the United States Supreme Court. Wisconsin's asserted interest of preparing self-reliant citizens for participation in society was rejected as uncompelling by the Supreme Court. The Amish had introduced convincing evidence that accommodating their religious objections by excusing a year or two of compulsory schooling would not impair the physical or mental health of the children or undermine their ability to be self-supporting and good citizens. *Yoder*, 406 U.S. at 221-29. In both *Sherbert* and *Yoder* the Supreme Court carefully distinguished cases involving the government's paramount interest in protecting physical or mental health, public safety, or public welfare. *Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 230. In addition, *Sherbert* noted that religious accommodation could be denied when the accommodation, by allowing non-uniform treatment, presented a problem of sufficient magnitude to render a statutory scheme unworkable. *Sherbert*, 374 U.S. at 408-09.

In Free Exercise Clause decisions cited by or following *Sherbert*, the Supreme Court has recognized these compelling governmental interests in a variety of situations. For instance, the Court found the need for uniformity paramount in a case requiring an Amish employer to pay Social Security taxes for Amish employees, *United States v. Lee*, 455 U.S. 252, 258-59 (1982), and in a case denying Jewish servicemen the right to wear a yarmulke, *Goldman v. Weinberger*, 475 U.S. 503, 508-510 (1986). It found public welfare paramount in a case enforcing the draft against persons who considered a particular war "unjust," *Gillette v. United States*, 401 U.S. 437, 462 (1971), and in a case denying tax exemptions to educational institutions with racially discriminatory policies, *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). The Court found the public health and safety interest decisive in upholding mandatory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),[7] and in enforcing

[7] *Jacobson* did not explicitly address the Free Exercise Clause. It did, however, discuss fundamental "liberty" interests. 197 U.S. at 26-27 and

child labor laws, *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944) (finding that a state's interest in protecting health justified prohibiting a nine-year-old Jehovah's Witness from distributing religious literature).

Finally, we do not think the Free Exercise Clause shields conduct violating a criminal law that protects people and property from physical harm. *Cf. Reynolds v. United States*, 98 U.S. (8 Otto) 145, 166 (1878) (posing the following rhetorical question: "[s]uppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

With this background in mind we measure the Access Act against RFRA. First, we believe the Access Act serves sufficiently compelling governmental interests. After all, the Act protects public health by promoting unobstructed access to reproductive health facilities. It also protects public safety by proscribing all violent, threatening or obstructive conduct specifically aimed at patients and providers of reproductive health services.

Second, we believe the Access Act is sufficiently narrow. The Act's prohibitions are directed only to those actions Congress found to be a national problem, specifically force, threat of force and physical obstruction. The Act does not sweep within its prohibitions activity unrelated to the serious trouble Congress sought to address.

We conclude that the Access Act serves sufficiently compelling government interests by the least restrictive means available. It therefore does not violate RFRA.

VI.

"There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Jacobson v.*

38-39. *Sherbert*, 374 U.S. at 403, and *Yoder*, 406 U.S. at 230, construe *Jacobson* as a health and safety case.

Massachusetts, 197 U.S. 11, 26 (1905) (Harlan, J.). In passing the Access Act, Congress acted to ensure that violence and aggressive obstruction are not used as means of settling what has become a loud and vexing public dispute.

The Access Act strikes a balance among competing rights holders. It protects those who seek or provide reproductive health services without suppressing robust debate about abortion. Those opposed to abortion or to any other reproductive health service retain the freedom to express their deeply-held moral or religious views in a peaceful, non-obstructive way.

The district court's order dismissing the complaint is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 94-700-A

AMERICAN LIFE LEAGUE, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA
and JANET RENO,

Defendants.

OPINION AND ORDER

I. The Parties Involved in this Lawsuit.

[Filed Jun 16, 1994, U.S. District Court, Alexandria, Virginia]

Plaintiffs, who are opposed to abortion on moral, religious and other grounds, brought this action challenging the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE" or "the Act"). Along with their Complaint, plaintiffs filed a Motion for a Preliminary Injunction. Defendants filed a Motion to Dismiss. These motions are now before the Court.[1] All parties agreed at oral argument of these

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[1] On June 3, 1994, the Court previously granted a Motion to Intervene, pursuant to Fed. R. Civ. Pro. 24(a)(2), filed by the National Abortion Federation, Commonwealth Women's Clinic, Capitol Women's Clinic, Dr. George Tiller, Dr. Susan Wicklund and the National Organization for Women. On June 10, 1994, the Court denied, from the bench, plaintiffs' Motion for Class Certification, which had been filed with their Complaint.

motions that the plaintiffs' Second Amended Complaint creates a ripe controversy for this Court to consider and decide.[2]

Plaintiff American Life League, Inc. (ALL) is an organization located in Stafford, Virginia, which conducts various educational and legislative activities "relating to the human rights of persons born or unborn." ALL alleges that it does not advocate or condone violent conduct in pursuit of its goals. However, ALL also alleges that it and its members intend to interfere with abortion providers and to injure them financially, by persuading their customers—pregnant women—not to undergo abortion procedures. Similarly, ALL alleges that

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[2] Federal courts are courts of limited jurisdiction. *See, e.g. Marbury v. Madison*, 1 Cranch (5 U.S. 137, 173-80 (1803). It is the responsibility of the complainants to allege facts demonstrating that they are the proper parties to invoke judicial resolution of this dispute and that an actual or threatened application of FACE exists. *See, Bender v. Williamsport Area School District*, 475 U.S. 534, 549, 106 S. Ct. 1326, 1335, 89 L.Ed. 2d 501 (1986); *Renne v. Greary*, 111 S. Ct. 2331, 2338 (1991). Plaintiffs' original Complaint did not allege that they intended any actions which would arguably invoke the statute in question. Plaintiffs' First Amended Complaint alleged that they have obstructed in the past and "may obstruct" entrances to abortion facilities. At oral argument, after dismissing the Amended Complaint as not ripe, the Court permitted plaintiffs to amend again. Plaintiffs' Second Amended Complaint alleges that while individual plaintiffs are peaceable and nonviolent, "in the aggregate, their action at times has constituted, and in the future will constitute, in the words of FACE, a 'physical obstruction' (that is, temporarily rendering impassable ingress to an abortion facility)" and that by so doing, they interfere with, and/or intimidate and/or injure abortion seekers and providers. As 13 U.S.C. § 248 applies to whoever, by physical obstruction, interferes with a person because that person is obtaining or providing reproductive health services, the plaintiffs' allegations that they plan to do so, combined with their allegations that they have regularly done so in the past, create a sufficient showing that FACE will be applied to them.

its members' activities at various abortion facilities necessarily injure or intimidate pregnant women in that ALL seeks to evoke feelings of religious or moral guilt or general emotional distress, for the purpose of dissuading women from aborting their pregnancies.

Plaintiff Patricia Lohman runs a pregnancy counseling service, located approximately 250 feet from an abortion clinic, which counsels pregnant women about alternatives to abortion. She also shares ALL's intent to obstruct clinic entrances. The other named plaintiffs are individuals who have engaged, and would like to continue to engage, in demonstrating, praying and sidewalk-counseling in the vicinity of facilities which provide abortions. They all claim to be peaceful and nonviolent, but, like ALL's numerous members, they frequently pursue their activities in concert with other like-minded individuals. They allege that their combined physical presence has caused and will cause physical obstruction of the entrance to facilities providing reproductive health care, and that they intend to interfere, nonviolently, with abortion patients and providers.

Defendant Janet Reno, in her capacity as Attorney General of the United States, is charged with the enforcement of the laws of the United States, including FACE.[3] Intervenor National Abortion Federation (NAF) is a professional organization of physicians, nurses and clinics providing reproductive care, including abortions, for women. Intervenors Commonwealth Women's Clinic,

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[3] On June 6, 1994, in Milwaukee, Wisconsin, Federal prosecutors invoked FACE for the first time, charging six people who were arrested June 4, 1994, after they allegedly used chains and concrete-filled 55 gallon drums to attach themselves to two cars parked so as to block the entrance to a downtown Milwaukee clinic for about ninety minutes.

Capitol Women's Clinic, Dr. George Tiller and Dr. Susan Wicklund are clinics and physicians that perform abortions and have been threatened and stalked and whose facilities have been damaged by violent anti-abortion protestors. Intervenor National Organization for Women has among its members thousands of women who may seek abortions or other reproductive health services.

II. The Statute at Issue.

On May 26, 1994, President Clinton signed the Freedom of Access to Clinic Entrances Act into law, stating that he intended it to be vigorously enforced. FACE is a criminal statute which provides for both criminal penalties and civil remedies against:

> "whoever— (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services."

18 U.S.C. § 248 (a) (1).[4] The essential elements of a violation of 18 U.S.C. § 248 (a) (1) are conduct and specific intent. The Act prohibits three kinds of conduct: (1) the use of force; (2) the threat of force; and (3) physical obstruction. The specific intent necessary to run afoul of

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[4] The statute provides for the following criminal penalties: for a first offense, a fine or imprisonment for up to one year. Anyone committing a second or subsequent offense shall

> be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine

FACE is intent to injure, intimidate or interfere with a person who is obtaining or has obtained or is providing or has provided, reproductive health services. Plaintiffs' nonviolent activities, as described in their second Amended Complaint, fall within the statute's ambit because they allege that they will cause a physical obstruction of clinics that provide abortion services, with the requisite intent to financially injure the abortion providers and to "interfere with" the women who may be entering a facility to procure an abortion.

III. Congress's Authority to Enact FACE.

At the outset, the Court rejects the plaintiffs' argument that Congress lacked authority to enact FACE. Congress has the power, under the Commerce Clause, U.S. Const. art. I § 8, cl. 3, and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, to regulate interstate commerce and intrastate activity that affects interstate commerce. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942); *Katzenbach v. McClung*, 379 U.S. 294, 301-302 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). This authority extends to enacting criminal penalties for individual acts, even if not all of the potential defendants had

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shall be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

Civil remedies include injunctive relief, compensatory and punitive damages, along with costs and reasonable attorney and expert witness fees. In lieu of actual damages, statutory damages of $5,000 per violation are available. 18 U.S.C. § 248(c)(1)(A) and (B). FACE also empowers the Attorney General, of the United States, as well as the state attorneys general to bring civil actions for injunctive relief and civil penalties against individual or group violators. 18 U.S.C. § 248(c)(2) and (3).

actual connections to interstate commerce. *Perez v. United States*, 402 U.S. 146, 154-156 (1971); *Russell v. United States*, 471 U.S. 858 (1985). The legislative history of FACE shows that Congress had evidence both of numerous women crossing state lines to obtain reproductive services no longer available in their home states and of anti-abortion organizations crossing state lines in order to orchestrate violence against abortion providers and patients. S. Rep. No. 117, 103d Cong., 1st Sess. The Senate hearings also include extensive testimony concerning the inability and, in some cases, unwillingness of local law enforcement authorities to provide adequate protection for reproductive health service clinics, their staffs, and patients.[6] *Id.* We find that Congress had ample evidence of the impact upon interstate commerce of myriad threats, bombings, stalkings, blockades and assaults inflicted on reproductive health services providers and patients, and that the prohibitions in FACE are a reasonable and appropriate means to address the problem. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 276 (1981).

IV. Freedom of Expression Issues.

At the heart of plaintiffs' constitutional challenge are their arguments that FACE prohibits and penalizes, or

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[6] For example, the Senate Report notes in its discussion of the need for such legislation that:

> From 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder. In addition, over 6,000 clinic blockades and other disruptions have been reported since 1977. The record before the Committee establishes that state and local law enforcement is inadequate to handle this situation, and that Federal legislation is urgently needed.

Id. at 3.

chills, free expression of religious, moral and philosophical beliefs; that it impermissibly focuses criminal and civil sanctions on particular viewpoints; and that it is unconstitutionally vague, giving law-abiding citizens inadequate guidance as to exactly what it prohibits.

Plaintiffs first argue that FACE is overbroad because they believe it imposes criminal and civil penalties for forms of expression, such as praying and sidewalk counseling, which are covered by the First Amendment. Overbreadth refers to a statute's being written so as to include protected First Amendment activity along with unprotected conduct. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Their argument is largely based on their expressed concern that the term "injure," which is not defined in the Act, might include psychological or emotional injury, which could result from plaintiffs' pure speech. Plaintiffs make the point that pure speech, which is at the core of First Amendment protection, may, and is, in the context of abortion protest, intended to, "injure" by causing emotional pain and to "intimidate" or, if persuasive and articulate, even "interfere." They argue that persons who desire to express their views, pray and sidewalk-counsel at the entrance of reproductive health services facilities are now afraid to do so for fear that these peaceful, nonviolent, expressive activities are prohibited by FACE. In other words, plaintiffs argue that their First Amendment expression will be "chilled."

Contrary to plaintiffs' assertions, the Court finds that this statute avoids infringing on legitimate First Amendment rights. Nothing in the language of FACE prohibits pure speech; rather the Act criminalizes the use of force, threat of force, and physical obstruction. 18 U.S.C. § 248(a) (1). These acts have long been outside the scope of the First Amendment's protection. *See Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2199 (1993). In *Mitchell*, a unanimous Court held that a penalty enhancement for

criminal conduct motivated by racial bias did not violate the First Amendment. The Court explained that conduct does not become "speech" entitled to the protection of the First Amendment whenever the actor intends to express an idea through his conduct. *Id.*, quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"). FACE is crafted to prohibit and penalize only those "potentially expressive" acts that Congress found were producing and would continue to produce "special harms distinct from their communicative impact." *See Roberts, supra.* Even the non-violent blocking which plaintiffs contemplate constitutes the torts of trespass, battery and false imprisonment under state laws. More importantly, in the scenario which plaintiffs have chosen to present for the Court's review, non-violent obstruction of clinic entrances prevents women from exercising their constitutuional right to an abortion. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). The First Amendment protects the plaintiffs' right to hold and express beliefs opposing abortion; it does not give them unfettered license to express those beliefs in conduct. Similarly, threats to use force are not protected by the First Amendment, and Congress may criminalize threats to a particular victim if doing so furthers an important interest. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992).

Plaintiffs' argument that their rights to pray and counsel will be chilled is but a restatement of the previous argument. As discussed above, FACE does not apply, on its face, to purely verbal activity. Plaintiffs rely upon *R.A.V. v. City of St. Paul, supra*, in which the Supreme Court found a "hate crime" ordinance prohibiting the display of certain symbols, objects, appellations and graffiti facially invalid. This reliance is misplaced.

The St. Paul ordinance focussed on particular viewpoints and directly prohibited verbal expression; as discussed *infra*, FACE does neither.

Because FACE's language refers to action, not words, plaintiffs have exercised their creativity to find interpretations of the Act's terms that encompass pure speech. However, their arguments ignore the definitions of the relevant terms included in the Act itself, which each describe tortious conduct rather than viewpoint expression. The Act, for example, defines the term "interfere with" to mean "to restrict a person's freedom of movement." 18 U.S.C. § 248(e) (2). Words or prayers alone will not restrict a person's freedom of movement. Speaking or praying accompanied by shoving or positioning oneself to block a walkway, as plaintiffs intend, will restrict a person's freedom of movement. The former—pure speech—does not violate the Act; the latter—speech plus conduct—will create a prohibited interference.

In addition to drafting FACE narrowly so as to prohibit certain conduct, rather than speech, Congress included "Rules of Construction" the first of which is: "—Nothing in this section shall be construed— (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected by the First Amendment to the Constitution." 18 U.S.C. § 248(d) (1). While the Court agrees with plaintiffs that Congress could not make a fatally flawed law constitutional merely by including a saving clause, in this context the rule of construction removes any ambiguity which plaintiffs can inject into the otherwise plain meaning of the Act's words. Without ambiguity, there is no chill. Protestors who are not chilled by the existing laws against trespass and assault could not reasonably be chilled by this Act.

The plaintiffs also argue that FACE is unconstitutionally vague on its face. Their argument is essentially the same one addressed above in the overbreadth discussion.

A statute is unconstitutionally vague if people "of common intelligence must guess at its meaning." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). The Court does not agree that the Act is vague. The language of FACE is neither technical nor arcane. Moreover, most of the operative words come from other statutes which the Supreme Court has construed and found not unconstitutionally vague. Of particular relevance is the Supreme Court's decision that a statute which prohibited "picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress" was not unconstitutionally vague. *Cameron v. Johnson*, 390 U.S. 611, 612 (1968). This is the same definition for "physical obstruction" that appears in FACE. This Court cannot hold that this definition is unconstitutionally vague.

The remaining terms, "use of force" and "threat of force" are, without doubt, clear to anyone making an honest effort to understand rather than ignore the plain meaning of this Act. FACE plainly prohibits only physical obstruction, the use of force, and threats. Congress need not append a laundry list of violent acts, threats and manners of obstructing in order to express its clear intent.

The plaintiffs further argue that FACE is not viewpoint neutral because, they assert, it applies only to anti-abortion protestors, "and not to persons who use similar tactics or worse to persuade women to have abortions they do not want." Upon a reading of the unambiguous language of FACE, the Court disagrees with this characterization of the statute. Plaintiffs cannot point to any language in FACE which supports their interpretation. Instead, they rely on a sentence uttered by Senator Kennedy during floor debate of a proposed amendment which was subsequently defeated. The proposed amendment, according to plaintiffs, would have provided a cause of action for would-be protestors who allege

violations of their First Amendment rights throught the suppression of anti-abortion demonstrations. Senator Kennedy spoke against the proposed amendment, stating "a cause of action for prolife demonstrator[s] will transform the bill from a clinic access bill to a clinic harassment bill." 139 Cong. Rec. S15706 (daily ed, November 16, 1993) (statement of Senator Kennedy). Plaintiffs argue that despite Senator Kennedy's characterizing FACE as "a clinic access bill", his statement supports their position that FACE applies only to anti-abortion protestors. This needle from a veritable haystack of legislative history is not relevant to our interpretation. Where the plain language of a statute is clear and unambiguous, courts do not look to the legislative history to find some different meaning. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). While it is clear from the Senate hearings that Congress was concerned about protecting clinics from violent anti-abortion protestors, FACE applies to "whoever" engages in the prohibited conduct, with the requisite intent to injure, intimidate or interfere with "any person" who is entering a facility to obtain reproductive health services. 18 U.S.C. § 248. Both the terms "whoever" and "person" are gender-neutral. The Act defines "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(d). This broad definition of reproductive health services encompasses a wide variety of services and procedures, including diagnosis and treatment of sexually transmitted diseases, infertility testing and treatments, pre-natal care, obstetrics, and, presumably, controversial conception treatments, such as *in vitro* fertilization of surrogate mothers and thawing of frozen embryos. Anyone, male or female, entering a facility seeking any of these

medical services is protected under FACE. As such, although the statute is subject-specific in that it protects access to reproductive health services facilities, it is nevertheless viewpoint-neutral.

V. Free Exercise Clause

Finally, plaintiffs assert that FACE violates the Free Exercise Clause of the First Amendment to the Constitution, as well as the Restoration of Religious Freedom Act, 42 U.S.C. §§ 2000bb(b) (2), which provides that the government cannot "substantially burden a person's right to exercise of religion" unless it can show that such burden is the least restrictive means of furthering a compelling governmental interest. Plaintiffs' argument is that Congress's passage of FACE was motivated by "animosity to religion." They rely on *Church of Lukumi Babalu Aya v. Hialeah*, 113 S.Ct. 2217, 2234 (1993) which struck down a law contrived to prohibit ritual animal sacrifices performed by a particular sect as violating the Establishment Clause. That case is distinguishable from the case at bar in several ways, not the least of which is that animal welfare is not constitutionally protected, whereas a woman's right to an abortion is constitutionally protected. *See Roe* and *Casey, supra*. Moreover, from its legislative history, we know that it was the history of violent attacks against abortion clinics, providers and their patients, and other religion-neutral reasons which motivated Congress to enact FACE.

It suffices here to note that the plaintiffs have not alleged in any of their three complaints and do not contend in their memoranda that physical obstruction of abortion clinics is a sacrament or important ritual necessary to their observance of their faith. They have alleged that they oppose abortion on religious and moral grounds, and that they desire to pray for the souls of women who are obtaining abortions and for the souls of their unborn children. Their goal is to prevent abortions.

Nothing in the Act impinges upon plaintiffs' ability to pray for these results. What is limited by the Act is what else they may do while praying and counseling. They may not pray and counsel so as to physically obstruct access to reproductive health service facilities. As defined in the Act, "physical obstruction" means "rendering impassable ingress to or egress from a clinic." This language provides adequate guidance for anyone who truly wants to understand the scope of the Act, rather than look for tortured interpretations of its words. The statute, on its face, neither prohibits nor inhibits such prayers, counseling or self-expression.

VI Conclusion

For the above reasons, the Court holds that FACE is constitutional. The United States' Motion to Dismiss is therefore GRANTED, and plaintiffs' Second Amended Complaint is hereby DISMISSED WITH PREJUDICE. This decision renders moot the plaintiffs' Motion for a Preliminary Injunction.

The Clerk is directed to forward copies of this Opinion and Order to counsel of record.

Entered this 16th day of June, 1994.

/s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Supreme Court, U.S.
FILED
JUL 26 1995
CLERK

(2)

No. 94-1867

In the Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN LIFE LEAGUE, INC., ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress lacked authority under the Commerce Clause and the Fourteenth Amendment to enact the Freedom of Access to Clinic Entrances Act of 1994.

2. Whether the Freedom of Access to Clinic Entrances Act is an unconstitutional content or viewpoint based restriction on speech.

3. Whether the Freedom of Access to Clinic Entrances Act is unconstitutionally vague or overbroad.

4. Whether the Freedom of Access to Clinic Entrances Act infringes on rights protected by the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 47 F.3d 642. The opinion of the district court (Pet. App. 25a-37a) is reported at 855 F. Supp. 137.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1995. The petition for a writ of certiorari was filed on May 12, 1995. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (the Access Act) (to be codified at 18 U.S.C. 248)[1] in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. From 1977 through April, 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. *Id.* at 3,6. This violence endangered the lives of and inflicted injuries on physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. *Id.* at 5.

Groups opposed to abortion also organized blockades designed to bar access to health care clinics and to overwhelm local law enforcement. S. Rep. 7. From 1977 through April, 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. *Ibid.*; see also *National Org. for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1489-1490 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part *sub nom. Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). Providers of abortions also received numerous death threats. S. Rep. 10.

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[1] All references to 18 U.S.C. 248 are to the 1994 edition of the United States Code, in which that Section will be codified.

Violence aimed at abortion providers and facilities, including shootings, bombings, arson, death threats, chemical attacks, and clinic blockades, has occurred in at least 28 States, the District of Columbia, and dozens of cities. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. *Id.* at 31. Many patients seeking such services travel to obtain services in another State (*ibid.*), and clinic employees often travel across state lines to work (*ibid.*).

The declared purpose of the violent and threatening activities aimed at abortion providers, facilities, and patients has been to inhibit women's access to safe and legal abortion services. *Id.* at 11 & n.22; *NOW*, 726 F. Supp. at 1488. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and closing clinics. Congress concluded that this violent and threatening conduct

> interfer[es] with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994). See also S. Rep. 11, 32.

Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. S. Rep. 17. Congress passed the Access Act in

response to the record of nationwide violence and obstruction. President Clinton signed the bill into law on May 26, 1994. The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injuries, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services.

Access Act § 3, 108 Stat. 694 (18 U.S.C. 248(a)).[2]

In addition to defining a number of its terms, the Act provides, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." Access Act § 3, 108 Stat. 696 (18 U.S.C. 248(d)(1)).

The civil remedies prescribed by the Act include injunctive relief, compensatory or statutory damages, punitive damages, and costs and fees. Access Act § 3,

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[2] The Act also prohibits the same activities if directed at any person lawfully exercising or seeking to exercise the right of religious freedom at a place of religious worship, or the property of a place of religious worship. Access Act § 3, 108 Stat. 694 (18 U.S.C. 248(a)(2) and (3)). Petitioners do not challenge any of those provisions.

108 Stat. 695-696 (18 U.S.C. 248(c)). The Act authorizes civil actions by the Attorney General of the United States or a State Attorney General. *Ibid.* (18 U.S.C. 248(c)(2) and (3)). In such actions, the court may also impose a monetary penalty not exceeding a statutorily specified amount, which varies depending on the nature of the offense. *Ibid.* Persons involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services also may bring civil actions for certain civil remedies. Access Act § 3, 108 Stat. 695 (18 U.S.C. 248(c)(1)).

The criminal penalties prescribed by the Act vary with the nature of the violation, depending on whether the conviction is for a first offense and the level of violence involved. Access Act § 3, 108 Stat. 695 (18 U.S.C. 248(b)).

2. ***Factual Background***

Petitioner's Second Amended Complaint was dismissed for failure to state a claim upon which relief could be granted. The following statement therefore assumes the truth of the facts stated in that complaint.

Petitioner American Life League, Inc., conducts educational and legislative activities regarding the rights of "persons born and unborn." See Pet. App. 3a (quoting Second Amended Complaint). The five individual petitioners oppose abortion "upon theological, moral and other grounds." *Ibid.* One petitioner has often prayed near clinics that perform abortions and the other petitioners have conducted peaceful demonstrations that have physically obstructed access to abortion clinics. *Ibid.*

Petitioners filed this action against the Attorney General of the United States alleging that the individual petitioners' continuing anti-abortion activities put them in jeopardy of violating the Access Act and that the Act violates the Constitution and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Pet. App. 3a. Additional defendants were allowed to intervene, including a reproductive health clinic, two physicians, and the National Organization for Women. *Id.* at 4a.

The district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. Pet. App. 25a-37a. The court of appeals affirmed. *Id.* at 1a-24a.[3] The court concluded that Congress had the authority under the Commerce Clause to enact the Access Act. *Id.* at 7a. The court found that, "[b]ased on an extensive legislative record, Congress rationally concluded that violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce." *Ibid.* The court reviewed the congressional findings and concluded that Congress found that interstate commerce was threatened. *Ibid.* It also ruled that the regulatory means chosen by Congress are reasonably adapted to the Act's permissible ends, including protecting the flow of goods and services in commerce, protecting patients in their use of lawful reproductive health clinic services, protecting women exercising their con-

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[3] Based on its decision in this case, the court of appeals also affirmed the dismissal of the complaint in *Woodall* v. *Reno*, 47 F.3d 656 (4th Cir. 1995). The Court denied a petition for a writ of certiorari in that case on June 19, 1995. *Woodall* v. *Reno*, No. 94-1417.

stitutional right to choose an abortion, protecting the safety of reproductive health care providers, and protecting reproductive health care facilities from physical destruction and damage. *Ibid.*

The court also held that the Access Act does not violate the First Amendment's Free Speech Clause. The court reasoned that the Act targets constitutionally unprotected activities such as violence, threats and blockades. To the extent it incidentally proscribes some conduct with expressive elements, such as peaceful but obstructive picketing, the Act is content and viewpoint neutral and therefore subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). Pet. App. 11a-13a. The court found that the Act serves substantial government interests, is not aimed at expression, is narrowly tailored, and leaves open ample alternative means for communication. *Id.* at 14a-17a. The court rejected petitioners' claim that the Act is unconstitutionally vague or overbroad. *Id.* at 17a-18a.

Finally, the court of appeals ruled that the Act does not violate the First Amendment's Free Exercise Clause or RFRA. The court reasoned that the Access Act "punishes conduct for the harm it causes, not because the conduct is religiously motivated." Pet. App. 20a. The court held that, unlike the ordinances at issue in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 113 S. Ct. 2217 (1993), which singled out religious practices for discriminatory treatment, the Access Act is a "generally applicable law, neutral toward religion," and therefore does not violate the Free Exercise Clause. Pet. App. 20a. With regard to RFRA, the court ruled that the Access Act serves compelling government interests and is narrowly

tailored to prohibit only activity that Congress found to be a national problem, *i.e.*, force, threats of force, and physical obstruction. *Id.* at 23a. The court pointed out that "those opposed to abortion or to any other reproductive health service retain the freedom to express their deeply-held moral or religious views in a peaceful, non-obstructive way." *Id.* at 24a.

ARGUMENT

1. Petitioners contend (Pet. 7-12) that Congress exceeded its authority under the Commerce Clause by enacting the Access Act. Petitioners argue (Pet. 9) that the Act is invalid under *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because the activity it prohibits does not substantially affect interstate commerce.[4]

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

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[4] Petitioners also contend (Pet. 12-14) that Congress did not have authority to enact the Access Act under Section 5 of the Fourteenth Amendment. In light of its ruling that the Access Act is within Congress' commerce power, the court of appeals did not reach this issue. Pet. App. 6a.

The Access Act passes muster under two of the categories identified by the Court in *Lopez*. First, the Act may be sustained as a proper exercise of Congress's power to regulate or protect "persons or things in interstate commerce." 115 S. Ct. at 1629. Congress reasonably concluded that "persons [who are] * * * obtaining or providing reproductive health services," Access Act § 3, 108 Stat. 694 (18 U.S.C. 248(a)(1)), often move in interstate commerce. As the Senate Report observed, "many of the patients who seek services from [abortion providers] engage in interstate commerce by traveling from one state to obtain [the abortion] services in another." S. Rep. 31; accord H.R. Rep. No. 306, 103d Cong., 1st Sess. 10 (1993) (H.R. Rep.). Additionally, physicians and other reproductive health services providers often travel across state lines to provide abortion services. *Ibid.* Substantial evidence also demonstrated that reproductive health services facilities acquire and dispense equipment, "medicine, medical supplies, surgical instruments and other necessary medical products * * * from other States." S. Rep. 31. Cf. *United States* v. *Robertson*, 115 S. Ct. 1732, 1733 (1995) (per curiam).

The Access Act may also be sustained as an exercise of Congress's power to regulate "activities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630. Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154

(1971) (emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-258 (1964) (motel catering to interstate guests); *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one opthalmologist affects interstate commerce).

As indicated above, Congress had ample basis for concluding that reproductive health services substantially involve interstate commerce: Providers purchase supplies from sources in other States; clinic employees and doctors often cross state boundaries to get to work; and many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another." S. Rep. 31. Congress also had ample basis for concluding that the violent and obstructive conduct proscribed by the Access Act may have an adverse impact on this interstate commerce. S. Rep. 14, 17, 31; H.R. Rep. 8-9. Such conduct has forced some clinics to close, caused millions of dollars in damages to others, and reduced the availability of reproductive health services and the interstate movement of people and goods. S. Rep. 5, 17, 31; H.R. Rep. 8. The purpose of the conduct is to suppress commerce in abortion services. S. Rep. 32. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of discrimination supported Congress's conclusion that it substantially affected interstate commerce).

The Access Act differs in several relevant respects from the statute held invalid in *Lopez*. In *Lopez*, the Court held invalid the provision of the Gun Free School Zones Act that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that "possession of a firearm in a local school zone does [not] substantially affect interstate commerce," *id.* at 1632, noting that possession of a gun in the vicinity of a school zone bore such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce, *id.* at 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 1631.

In contrast, the Access Act "by its terms" directly addresses "commercial activity" and "economic enterprises," and prohibits interference with persons because they are engaging in commercial transactions, § 3, 108 Stat. 694, (18 U.S.C. 248(a)(1) ("obtaining or providing reproductive health services")). It also prohibits blockading of commercial facilities, § 3, 108 Stat. 696 (18 U.S.C. 248(e)). Such blockading interferes with the provision of an interstate commercial service and threatens in the aggregate to eliminate abortion services from national commerce. See S. Rep. 3. The "design of the statute ha[s] an evident commercial nexus," *Lopez*, 115 S. Ct. at 1640. It ensures access to a particular commercial service

and is designed to prevent elimination of that service from the national commerce. No inferential leaps are required—the purpose and effect of the prohibited conduct are to halt a service that Congress concluded is part of interstate commerce. The Access Act is also supported by a legislative record containing abundant evidence and specific congressional findings of the effect of the proscribed conduct on interstate commerce.

The district court decision in *United States* v. *Wilson*, 880 F. Supp. 621, (E.D. Wis. 1995), appeal pending No. 95-1871 (7th Cir.), does not justify review by this Court at this juncture. In holding that the statute exceeds congressional authority to legislate under the Commerce Clause and the Fourteenth Amendment, the Wilson court parted company with every other court that has considered the validity of the Access Act. The opinion in *Wilson* was issued prior to this Court's opinion in *Lopez*, and, for the reasons already noted, its holding is incorrect. In an opinion issued after the Court's opinion in *Lopez*, the Eleventh Circuit upheld the Access Act as within Congress's Commerce Clause power and expressly rejected the reasoning of the district court in *Wilson*. *Cheffer* v. *Reno*, 55 F.3d 1517, 1521 n.6 (1995). The *Wilson* case is currently pending on appeal before the Seventh Circuit. Such an erroneous district court decision creates no conflict in the circuits calling for this Court's review.

2. Petitioners contend (Pet. 19-26) that the Access Act is facially invalid under the First Amendment because it is a content and viewpoint based restriction on speech. Petitioners' arguments in this regard are substantially similar to those raised by petitioners in *Woodall* v. *Reno*, No. 94-1417, which

the Court declined to review. See note 3, *supra*. The Court should deny review of these issues in the present case for the same reasons.

a. Petitioners' argument is based on a fundamental misunderstanding of the prohibitions contained in the Access Act. The Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortions. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings).[5]

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[5] The Act also provides narrowing definitions of several key terms that further limit the conduct it proscribes. Access Act § 3, 108 Stat. 696 (18 U.S.C. 248(e)). The Act defines "interfere with" to mean "to restrict a person's freedom of movement." *Ibid.* (18 U.S.C. 248(e)(2)). "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." *Ibid.* (18 U.S.C. 248(e)(3)). "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *, or rendering passage to

The Act does not restrict petitioners' ability to communicate with their desired audience. The Act permits speech, signs, prayer, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. See *United States* v. *Brock*, 863 F. Supp. 851, 864-865 (E.D. Wis. 1994), appeals pending, Nos. 95-1308, 95-1309, 95-1333, 95-1430, 95-1488, 95-1494 (7th Cir.); *Riely* v. *Reno*, 860 F. Supp. 693, 700-704 (D. Ariz. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1426-1427 (S.D. Cal. 1994).

b. Even if the conduct regulated by the Access Act had sufficient expressive content to implicate the First Amendment, the Act would easily survive scrutiny under the test set forth by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (a) serves a substantial governmental interest, (b) restricts conduct for reasons unrelated to its expressive content, and (c) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves at least three substantial and legitimate governmental interests: preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. Those interests are unrelated to any expressive content the for-

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or from such a facility * * * unreasonably difficult or hazardous." *Ibid.* (18 U.S.C. 248(e)(4)). "Reproductive health services" means "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." § 3, 108 Stat. 696-697 (18 U.S.C. 248(e)(5)).

bidden conduct may have. Nor does the Access Act proscribe conduct with reference to its expressive content, if any. As explained above, the Act permits the expression of any message, including a message of hostility to abortion.

In addition, the Act does not limit its protection to "abortion clinics"; it covers all facilities offering reproductive health services, including facilities offering services related to carrying pregnancies to term. The use of force or physical obstruction to blockade such a facility violates the Act as does a blockade of a facility offering abortion services.

Nor does conduct violate the Act only when correlated with a particular message or viewpoint. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force to achieve this end would violate the Act. Petitioners' assertion that the Act applies only to those who oppose abortion is incorrect: the Act proscribes conduct without regard to the message conveyed (if any) or the viewpoint of the person engaging in that conduct.

Petitioners assert (Pet. 18) that the legislative history of the Act shows that the Act's purpose was to restrain anti-abortion protests. The violence and blockades in which some anti-abortion protestors engaged were catalysts that led to passage of the Act; the legislative history, however, shows no congressional animus toward the message conveyed by such protestors. Congress designed the Act to proscribe unprotected *conduct*, while leaving protestors completely free to convey their message by lawful means.

The Act proscribes certain conduct only when a person directs that conduct at another "because" the

other seeks to obtain or provide reproductive health services. This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1933).[6]

The fact that the majority of persons who wish to engage in conduct that would violate the Access Act may, in practice, be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility to the Vietnam war. But the law was nonetheless constitutional because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes violent, threatening or obstructive conduct, regardless of any

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[6] The motive requirement of the Access Act limits the coverage of the law to conduct that implicates federal concerns. It distinguishes the use of force for the deliberate purpose of interfering with access to reproductive health services from, for example, a random attack of a woman on her way to receive such services, by an offender who neither knew nor cared where his victim was going. Such an attack would not implicate the federal concerns that led to passage of the Access Act, and Congress has chosen to leave such conduct to state regulation.

viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. Narrow tailoring is satisfied if a prohibition "promotes a substantial government interest that would be achieved less effectively absent" the restriction, and if the prohibition does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989). The Act easily meets that test. It is narrowly drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not unnecessarily impinge on expression; indeed, even in the immediate vicinity of covered facilities, the Act leaves open every peaceful and non-obstructive means for people to express their views.

This Court's recent decision in *Madsen* v. *Women's Health Ctr., Inc., supra*, confirms the Act's constitutionality. *Madsen* concerned protests outside a women's health clinic in Florida. A state court enjoined the defendants and those acting in concert with them from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act: (1) interfering with access to, ingress into, and egress from the clinic; (2) physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic; and (3) harassing, intimidating or threatening any doctor or other employee of the clinic. See 114 S. Ct. at 2522. The injunction was limited in its application to the named, pro-life activist defendants and those acting in concert with them.

This Court nevertheless held the injunction to be content neutral; the Court concluded that the restrictions were unrelated to the defendants' message and that any effect on their expression was incidental to the government's regulation of threatening conduct. *Id.* at 2524.[7]

3. Petitioners assert (Pet. 24-25) that the Access Act is unconstitutionally vague and overbroad. As noted above, however, the Act prohibits only the use of force, the threat of force, or physical obstruction to achieve certain ends. The term "physical obstruction" is defined to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

Access Act § 3, 108 Stat. 696 (18 U.S.C. 248(e)(4)). This provision is almost identical to one this Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, *supra*. That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from [specified buildings].

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[7] *Madsen* held that a more stringent First Amendment test applies to content-neutral injunctions than to content-neutral statutes. 114 S. Ct. at 2524-2526. *Madsen* accordingly demonstrates the error of petitioners' assertion (Pet. 19-20) that the Access Act should be subject to more stringent scrutiny than the *Madsen* injunction.

Id. at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.[8]

4. a. Petitioners assert (Pet. 27-28) that the Access Act violates the Free Exercise Clause because its object is to restrict practices due to their religious motivation. Petitioners contend that the Act is invalid under *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 113 S. Ct. 2217 (1993), because the Act is an attempt by abortion advocates "to suppress the religiously motivated expression and conduct of their opponents." Pet. 27.

In *Lukumi*, the Supreme Court struck down city ordinances prohibiting the ritual slaughter of animals as practiced by the Santeria religion. The Court found that the city council, although ostensibly acting toward secular ends such as the protection of animal welfare, in fact adopted laws that pursued those ends only with regard to conduct motivated by religion, and carefully exempted conduct, such as hunting, that involved an identical degree of harm to animals but was not religious in nature. See 113 S. Ct. at 2222, 2229. The legislative history of the laws also showed extreme, express hostility by city council members toward the disfavored religion. *Id.* at 2231.

In contrast, the Access Act forbids specified conduct without regard to whether it was undertaken

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[8] Petitioners also challenge (Pet. 25-26) the provision for awarding damages under the Access Act contending that the Act impermissibly requires payment of damages for commercial injuries caused in whole or in part by First Amendment expression. The court of appeals correctly rejected the claim because the Access Act "does not subject anyone to damages caused by protected expression," but only for unprotected conduct. Pet. App. 18a-19a.

for religious or secular reasons. Whether a violator acts out of religious conviction or because of a completely secular view makes no difference under the Act. The same conduct is forbidden for all. The Court has held that neutral, generally applicable law does not offend the Free Exercise Clause, regardless of whether it has an incidental effect on religious practices. *Employment Division* v. *Smith*, 494 U.S. 872 (1990). The Act does not have the hidden effect of proscribing only religious conduct. Nor is there evidence of legislative hostility toward religion.[9] In any event, the Act serves compelling government interests, including protection of public health and safety. See p. 21, *infra*.

b. Petitioners also assert (Pet. 28-29) that the Access Act violates RFRA, 42 U.S.C. 2000bb *et seq.*

RFRA provides that the government may not "substantially burden a person's exercise of religion" unless it "demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that * * * interest." 42 U.S.C. 2000bb-1 (Supp. V 1993). Petitioners' exercise of religion is not substantially burdened here. They do not contend that physical obstruction of clinics is necessary to their observance of their faith. Pet. App. 36a. They allege that they desire to pray for the souls of women obtaining abortions and for the souls of unborn children. *Ibid.* The Act does not preclude petitioners from such prayer, even in the vicinity of abortion clinics. They are simply precluded from using force, threats of

[9] The Access Act was passed by the same Congress that passed the Religious Freedom Restoration Act, and the Access Act itself provides new protection against interference with religious activities at places of religious worship.

force, or physical obstruction; and petitioners do not assert that the use of force, the threat of force or physical obstruction is a part of their exercise of religion. Because the Access Act forbids only activities that are not alleged to be part of petitioners' religions, while leaving them free to engage in religious activities such as prayer, it places no burden on their exercise of religion.

Moreover, the court of appeals correctly ruled that the Access Act serves compelling governmental interests—"[a]fter all, the Act protects public health by promoting unobstructed access to reproductive health facilities. It also protects public safety by proscribing all violent, threatening or obstructive conduct specifically aimed at patients and providers of reproductive health services." Pet. App. 23a. The court of appeals also correctly ruled that the Act is sufficiently narrowly tailored. *Ibid.* As discussed above, the prohibitions of the Act, and the definitions of the Act's terms, are directed only to conduct involving force, threats of force, or obstruction that Congress found to be a grave national problem. The Act does not sweep within its scope activities unrelated to the evil Congress sought to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1867

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN LIFE LEAGUE, INC., et al.,

Petitioners,

—v.—

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ABORTION FEDERATION; NATIONAL ORGANIZATION FOR WOMEN; COMMONWEALTH WOMEN'S CLINIC; CAPITOL WOMEN'S CENTER, INC.; GEORGE TILLER, DOCTOR; SUSAN WICKLUND, DOCTOR

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Congress had authority under the Commerce Clause or Section 5 of the Fourteenth Amendment to enact the Freedom of Access to Clinic Entrances Act.

2. Whether the Freedom of Access to Clinic Entrances Act is an unconstitutional content or viewpoint based restriction on speech.

3. Whether the Freedom of Access to Clinic Entrances Act is unconstitutionally vague or overbroad.

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STATEMENT OF THE CASE

A. Proceedings Below.

Petitioners American Life League, et al. (hereinafter "ALL"), filed this facial challenge to the Freedom of Access to Clinic Entrances Act ("FACE" or "the Act"), 18 U.S.C. § 248 et seq., on May 26, 1994, the day FACE became effective. On June 1, 1994, Respondents National Abortion Federation, the National Organization for Women, Commonwealth Clinic, Capitol Women's Clinic, Dr. George Tiller and Dr. Susan Wicklund (hereinafter "Respondents") moved to intervene as defendants; the court granted the intervention motion on June 3. Pet. App. A25. On June 16, the district court granted Respondent Reno's motion to dismiss. Pet. App. A25-A37. The court of appeals affirmed on February 13, 1995. Pet. App. A1-A24.

B. The Factual Record Of Harm To Respondents.

Respondents moved to intervene because they will be severely harmed if FACE is enjoined or held unconstitutional. The National Abortion Federation ("NAF") is a professional organization of physicians, nurses, counselors, clinic administrators and other medical professionals who provide women across the country with reproductive health services. Virulent anti-abortion zealots routinely target their attacks on many NAF members. Individual NAF members are regularly stalked and threatened, and many NAF clinics have been bombed and

blockaded. See Shaw Decl. ¶ 3.[1] In March 1993, a physician working at a NAF clinic, Dr. David Gunn, was brutally murdered by an anti-abortion militant. Id. ¶ 5. Other NAF members have received numerous death threats. Id. ¶ 6.

The National Organization for Women ("NOW"), is a membership organization devoted to securing equal rights for women, including access to reproductive health care. Its over 200,000 members throughout the country include many individuals who use and will use reproductive health services. NOW has been a plaintiff in many cases seeking remedies against anti-choice extremism. E.g., National Organization for Women v. Scheidler, 114 S. Ct. 798 (1994); Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988); and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated & aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990).

Respondents Commonwealth Women's Clinic ("Commonwealth") in Falls Church, Virginia, and the Capitol Women's Center ("Capitol") in Washington, D.C., are two clinics that provide a range of reproductive health services, including abortions. Codding Aff. ¶ 1. Commonwealth and Capitol clinics have been the targets of various forms of intimidation, harassment, blockades and violence, the perpetrators of which would be subject to prosecution or civil injunctive and monetary relief under FACE. In particular, anti-abortion extremists have "rendered impassable" the entrances and exits to all of the

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[1]The Shaw Declaration, the Wicklund Declaration, the Tiller Affidavit, and the Codding Affidavit were submitted in support of the Motion to Intervene.

clinics. Id. ¶¶ 4, 12-13. Anti-choice militants have also attempted to "injure or intimidate" clinic personnel and patients by sending repeated bomb threats and throwing iron bars and rocks through the clinic windows. Id. ¶¶ 7-8.

Anti-abortion militants have forced Respondents Drs. Wicklund and Tiller to practice medicine in a climate of fear and intimidation. Since 1991, Dr. Wicklund has been stalked by extremists, who routinely surround her car and house, following her every move. Wicklund Decl. ¶¶ 6-10. Throughout her career, she has also been threatened and assaulted by anti-abortion zealots. She was once assaulted by two anti-choice zealots who leapt from a van, grabbed her and slammed her against the van, all the while screaming that she was a "baby killer." Id. ¶ 13. Particularly when attempting to reach a clinic to provide abortion services, Dr. Wicklund has had her freedom of movement regularly impeded by zealots who have blocked her driveway, her car, and her person on a constant basis. Id. ¶¶ 6-10. Moreover, the clinics where Dr. Wicklund has provided services have been attacked by anti-choice extremists and their entrances and exits have been blockaded on numerous occasions. See id. ¶¶ 12, 16.

Dr. Tiller has had similar experiences. Throughout the years his clinic, Women's Health Care Services, has experienced numerous blockades and a pipe bombing that caused approximately $75,000 in damage. Tiller Aff. ¶¶ 1, 4. In particular, during what Operation Rescue called its "Summer of Mercy" in 1991, hundreds of militants surrounded the clinic, causing the overwhelmed local police department to ask the clinic to close its doors for five days. Id. ¶ 5. Even after the clinic obtained a federal injunction to prohibit Operation Rescue from blocking the entrances and exits of the clinic, zealots continued their blockades, including the particularly horrendous tactic of encouraging

children to lie on the street in front of vehicles to prevent patients from coming to the clinic. Id. In 1993, as Dr. Tiller attempted to leave the clinic, he was shot in each arm by Rochelle "Shelley" Shannon, an anti-abortion militant. Id. ¶ 6. The same day, Ms. Shannon also assaulted a nurse at Dr. Tiller's clinic. Id.

In contrast, ALL and other Petitioners have failed to allege any facts showing that they will be harmed by enforcement of FACE. Indeed, Petitioners filed three complaints before they succeeded in asserting a justiciable claim, as the court below found that the first two complaints did "not allege that they intended any actions which would arguably invoke the statute in question." Pet. App. A26. Moreover, as the court of appeals noted, one of the Petitioners, Patricia Lohman, directs a counselling facility that is protected under FACE. Pet. App. A11.

REASONS THE PETITION SHOULD BE DENIED

I. THIS COURT'S COMMERCE CLAUSE DECISIONS DEMONSTRATE THAT CONGRESS HAS AUTHORITY TO ENACT FACE, PARTICULARLY BECAUSE FACE PROTECTS PROVIDERS AND PATIENTS ENGAGING IN INTERSTATE COMMERCE.

Congress correctly invoked its power under the Commerce Clause of the United States Constitution in enacting FACE. Petitioners' contention (Pet. 8-12) that the Fourth Circuit decision conflicts with United States v. Lopez, __U.S.__, 115 S. Ct. 1624 (1995), misapprehends the stark contrast between the activity regulated in the Gun-Free School Zones Act and FACE. In order to avoid unnecessary repetition of Respondent Reno's arguments,[2] the argument below will address the issue of whether the activity targeted by FACE is a valid exercise of Congress' authority because it "regulate[s] and protect[s] . . . persons . . . in interstate commerce," id. at 1629, by prohibiting interference with persons "obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).[3]

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[2]To avoid duplication, Respondents National Abortion Federation et al. do not address ALL's meritless contentions that FACE impinges on free exercise of religion. In all respects regarding these claims or other claims not directly addressed in this brief, Respondents here adopt Respondent Reno's position.

[3]Although the focus of this brief is the second Lopez test, as the Eleventh Circuit recently held in Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995), the activity targeted by FACE also satisfies the third Lopez category of Commerce Clause regulation, because it targets "activities that substantially affect interstate commerce." 115 S. Ct. at 1630. The Eleventh Circuit drew heavily upon the reasoning of the Fourth Circuit in this case, stating that it "agree[d] with the Fourth Circuit that the

In contrast to the Gun-Free School Zones Act struck down in Lopez, which regulated an activity -- namely, education -- that is inherently local and noncommercial, FACE protects reproductive health clinics, which are commercial enterprises that purchase goods in interstate commerce, and doctors and patients, who engage in interstate commerce by traveling interstate to provide or receive reproductive health care. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (upholding Commerce Clause authority for Title II of the 1964 Civil Rights Act on the basis, inter alia, that motel serves interstate travelers).

Thus, FACE is analogous to United States v. Robertson, __U.S.__, 115 S. Ct. 1732 (1995), where this Court found that because an Alaskan gold mine purchased some of its supplies and equipment from out of state, hired seven out-of-state employees, and fifteen percent of its output went out of Alaska, the mine was an "enterprise . . . engaged in . . . interstate or foreign commerce." Id. These circumstances directly parallel the involvement of reproductive health care clinics in interstate commerce. As Congress determined prior to enacting FACE, "many of the patients who seek services . . . engage in interstate commerce by traveling from one state to obtain services in another," "clinic employees sometimes travel across State lines to work," and clinics purchase "medicine, medical

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Access Act [FACE] is within Congress' Commerce power, and adopt[ed] the reasoning in Part III.A. of the American Life League decision on this issue." Cheffer, 55 F.3d at 1520. The Eleventh Circuit specifically rejected as unsubstantiated the reasoning in United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), appeal docketed, No. 95-1871 (7th Cir. 1995), the only case to have held that FACE is beyond Congress' Commerce Clause authority. Cheffer, 55 F.3d at 1521.

supplies, surgical instruments and other necessary medical products, often from other States." S. Rep. No. 117, 103rd Cong., 1st Sess. 31 (1993) [hereinafter "S. Rep."]. Petitioners, in relying primarily upon Lopez, completely ignore the fact that FACE satisfies the second Lopez category and confine their largely rhetorical argument to the "affecting commerce" test. See discussion supra at 5 n.3.

The connection to commerce here is even stronger than the gold mine at issue in Robertson because "the very purpose of those engaging in the conduct addressed by [FACE] is to suppress the provision of abortion services." S. Rep. at 32 (emphasis added). Indeed, anti-choice militants testified before Congress that since they have been unable to use legal channels to prevent women from obtaining abortions, it is their goal to make abortion unavailable through illegal means: "We may not get laws changed or be able to change people's minds . . . [b]ut if there is no one willing to conduct abortions, there are no abortions." Id. (citation omitted). As this Court recently noted, there can be no greater interference with interstate commerce than a concerted attempt to eliminate the availability of and access to services by and for persons engaged in interstate commerce. See Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1846-48 (1991) (interstate commerce requirement satisfied by allegation of conspiracy to exclude surgeon from local market).

Moreover, congressional findings demonstrate that the nature of that interference and the need to protect doctors and patients engaging in interstate commerce was fully understood by Congress when it enacted FACE. In Lopez, this Court reaffirmed the proposition that as part of its independent evaluation under the Commerce Clause "we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on

interstate commerce." 115 S. Ct. at 1631. Unlike Lopez, where Congress made no findings regarding the effects of gun possession on interstate commerce, here Congress made extensive factual findings regarding the impact of anti-choice violence on interstate commerce and the need to protect persons in interstate commerce from this activity. FACE itself expressly invokes the Commerce Clause and the need to "promote the public safety and health." 18 U.S.C. § 248 note (1994). For example, the Conference Report, approved by the full Congress, noted the need to protect patients and employees moving in interstate commerce as well as the interstate nature of the prohibited conduct. H.R. Conf. Rep. No. 488, 103rd Cong., 2d Sess. 7 (1994). In addition, the Senate Committee recognized that "[c]linic blockades disrupt a wide range of health services [and] terrorize patients and staff." S. Rep. at 7.

Congress also relied on findings by federal courts concerning Respondents here who have been subjected to conduct designed to eliminate interstate commerce in reproductive health care. For example, the Senate Report noted a district court finding that the "avowed intent" of blockaders was to shut down Women's Health Care Clinic, the clinic Respondent Tiller operates. S. Rep. at 11 (quoting Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 261-62 (D. Kan. 1991), rev'd on other grounds, 24 F.3d 107 (10th Cir. 1994)).

The concerted efforts of anti-choice militants to decrease abortion services have been effective: this country faces a dire shortage of physicians who are trained and willing to provide abortions. Abortion services are now available in only seventeen percent of the counties in the United States. S. Rep. at 17; Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1987 and 1988, 22 Fam. Plan. Persp. 102, 106 (1990); see

also Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1991 and 1992, 26 Fam. Plan. Persp. 100, 103 (1994). Not surprisingly, the Senate Committee found that "anti-abortion violence and intimidation have contributed to this shortage." S. Rep. at 17; see also David A. Grimes, Clinicians Who Provide Abortions: The Thinning Ranks, 80 Obstetrics and Gynecology 719 (1992). As in Wickard v. Filburn, 317 U.S. 111 (1942), where the primary purpose of the statute at issue was to regulate the amount of wheat in interstate commerce to avoid surpluses and shortages, Congress' primary purpose in enacting FACE was to ensure the continued availability of reproductive health services.

Under Lopez's second category, Congress may protect persons moving in interstate commerce "even though the threat may come only from intrastate activities." 115 S. Ct. at 1629. Here, however, interstate commerce is implicated to an even greater degree because a substantial portion of the threat comes from interstate activities. Relying on court opinions and testimony from law enforcement officials, as well as from the Attorney General of the United States, the Senate Committee found that those engaging in anti-abortion blockades and related conduct travel all over the country to do so. S. Rep. at 12-13.

Indeed, Congress made specific findings that the Respondents in this case participate in interstate commerce. The Senate Report noted that "[c]linic employees sometimes travel across State lines to work," id. at 31, and identified Respondent Dr. Susan Wicklund, who provides abortion services in Minnesota, Montana, North Dakota, Wisconsin, and parts of Canada. S. Rep. at 31 & n. 46. Likewise, discussing a court finding about Respondent Commonwealth Clinic, the Senate Report on FACE noted that in Bray, this Court "accepted the district court's finding that substantial

numbers of women travel interstate to seek abortion services." S. Rep. at 31; see National Organization for Women v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989) (twenty to thirty percent of patients served at Respondent Commonwealth Women's Clinic came from out of state, including Maryland, D.C., Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). Similarly, the Senate cited a Kansas district court finding that "forty-four percent of the patients [at Respondent Dr. Tiller's clinic] came from out-of-State." S. Rep. at 31; Women's Health Care Services v. Operation Rescue, 773 F. Supp. at 266-67. Petitioners ignore these detailed Congressional findings regarding Respondents and the vast number of patients and providers who travel interstate to provide or obtain reproductive health services as well as the principle that courts must defer to these findings if there is a rational basis for them.

Moreover, in asserting that commerce regulation may not have even been the real legislative purpose of FACE (Pet. 10), Petitioners fail to heed that commerce regulation need not be the only, or even the primary, purpose of legislation that Congress enacts under its Commerce Clause authority. More than 30 years ago, this Court declared that "in framing Title II [prohibiting discrimination in public accommodations] Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." Heart of Atlanta Motel, 379 U.S. at 257 (1964).

Petitioners urge this Court to accept review in order to "enunciat[e] standards" (Pet. 12) to define Congress' legislative authority under the Commerce Clause. However, as Petitioners' brief itself reveals, this Court has recently done so in United States v. Lopez, by delineating three categories in which Congress may legislate, and Congress has met those standards in enacting FACE. The petition for certiorari must therefore be denied.

II. THIS COURT'S DECISIONS MAKE CLEAR THAT CONGRESS HAS AUTHORITY TO ENACT FACE PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT.

Section 5 empowers Congress "to enforce by appropriate legislation all of the provisions" of the Fourteenth Amendment. It is a "positive grant of legislative power," granting "broad powers" to Congress to protect the rights embodied in the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966). See also United States v. Guest, 383 U.S. 745, 784 (1966);[4] Ex parte Virginia, 100 U.S. 339, 345-46 (1879). Because childbearing decisions, including abortion, are constitutionally protected under the Fourteenth Amendment,[5] FACE is an appropriate exercise of congressional authority under Section 5, as well as the Commerce Clause.

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[4]In Guest, six justices joined at least one of two concurring opinions which reached the conclusion that "there now can be no doubt that the specific language of Section 5 empowers the Congress to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (Clark, J., concurring) (emphasis added); id. at 782 (Brennan, J., concurring).

[5]Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

Only one court, a district court, has ruled to the contrary in a decision that confuses judicial enforcement under the Fourteenth Amendment with Congressional power to legislate under Section 5. United States v. Wilson, 880 F. Supp. at 635. It is true, of course, that the Fourteenth Amendment protects the right to abortion only against state interference, and not against the private activity covered by FACE. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 756 (1993). However, it is equally well-settled that congressional authority under Section 5 is measured by a standard different from judicial authority, and does not depend on whether the covered activity is directly prohibited by the Fourteenth Amendment.[6] Thus, in Morgan, 384 U.S. at 644, this Court held that Section 5 authorized federal legislation prohibiting literacy tests as a prerequisite to voting, despite a previous holding in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959), that such tests did not deny equal protection. See also United States v. Dep't of Corrections of Wisconsin, No. 94-C-052-C, 1995 WL 379223 (E.D. Wis. June 23, 1995) (upholding enactment of Religious Freedom Restoration Act under Section 5).

For Section 5 purposes, the critical issue is whether the legislation is "plainly adapted" to protect Fourteenth Amendment rights. Morgan, 384 U.S. at 651; see also City of Rome v. United States, 446 U.S. 156 (1980). As

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[6]"Congress' power to enforce the Fourteenth Amendment is significantly broader than that of the judiciary, because Congress may determine -- on the basis of its superior fact-finding capabilities and on the basis of the broader range of remedial options open to it as a legislative body -- that certain measures are necessary . . . to ensure that . . . federal rights are fully secured." The Freedom of Access to Clinic Entrances Act of 1993: Hearings on S. 636 Before the Senate Comm. on Labor and Human Resources, 103rd Cong., 1st Sess. 98 (1993) (testimony of Laurence H. Tribe).

the Court in Morgan noted, Section 5 must empower Congress to legislate beyond what is prohibited by the Fourteenth Amendment if the provision is to have any significance. Otherwise, because the Fourteenth Amendment is self-executing, Section 5 would only empower Congress to replicate what the judiciary was already bound to do. Morgan, 384 U.S. at 648-649.

Petitioners' claim that Section 5 does not give Congress authority to legislate over private conduct (Pet. 12-14) ignores this Court's prior precedents and misapprehends the nature of Congressional authority under Section 5. In a unanimous opinion in District of Columbia v. Carter, 409 U.S. 418 (1973), this Court reaffirmed, in dictum, the proposition that to say "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct,' . . . is not to say . . . that Congress may not proscribe purely private conduct under Section 5 of the Fourteenth Amendment." Id. at 423, n.8. In fact, this Court has upheld in several cases the application of civil rights statutes to prohibit actors from interfering with constitutional rights not protected by "any provision of the Constitution addressed to private individuals." Guest, 383 U.S. at 779 (Brennan, J., concurring). For example, 18 U.S.C. § 241 has been found to prohibit private interferences with the right to vote in a federal election, Ku Klux Klan Cases (Ex Parte Yarbrough), 110 U.S. 651 (1884); the right to discuss public affairs or petition for redress of grievances, United States v. Cruikshank, 92 U.S. 542 (1875); and the right to inform of violations of federal law, In re Quarles & Butler, 158 U.S. 532 (1895). See generally L. Tribe, American Constitutional Law §§ 5-15, at 350-52 (2d ed. 1988).

In light of Supreme Court precedent indicating that Section 5 permits legislation prohibiting private interference with Fourteenth Amendment rights, Congress' enactment of

FACE is well within the boundaries of Section 5, for it is "plainly adapted" to securing the right to abortion. As the legislative history demonstrates, the force and obstruction that FACE is intended to curb threatens to eviscerate every woman's ability to exercise her constitutional right to reproductive choice. Indeed, that is the avowed purpose of the proscribed activity. S. Rep. at 11. There could be no better example of the appropriate use of Section 5 authority, particularly since congressional findings demonstrate that state and local law enforcement are unable to adequately address this overwhelming national crisis. Id. at 19.

Moreover, Congress has the power to enact legislation when constitutional rights are threatened in a manner which undermines general principles of equality and threatens equal protection. Indeed, the Supreme Court in Morgan concluded that Congress' prohibition on literacy tests for voting not only secured the right to vote for Puerto Rican citizens, but would also be "helpful in gaining nondiscriminatory treatment in public services" and obtaining "'perfect equality.'" 384 U.S. at 652-53. Additionally, as Justice O'Connor, speaking for the majority in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989), stated, "[t]he power to enforce [the provisions of the Fourteenth Amendment] may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

In enacting FACE, Congress relied not only on extensive legislative fact-finding to demonstrate that FACE was necessary to secure the right to reproductive choice, see supra, but also on its power to craft remedial options to fully secure equal protection for women. As the Supreme Court noted in Casey, "[t]he ability of women to participate equally in the economic and social life of the Nation has

been facilitated by their ability to control their reproductive lives." Casey, 112 S. Ct. at 2809.

As recent events tragically show, the right to abortion cannot be secured without legislation addressing the rampant violence and force directed against women and their health care providers. Thus, Section 5 provides Congress with more than adequate authority to legislate against anti-choice violence which threatens to prevent women from exercising their constitutional right to reproductive choice.

III. THE FOURTH CIRCUIT'S DECISION CONFORMS TO THE DECISION OF EVERY COURT WHICH HAS CONSIDERED WHETHER FACE VIOLATES THE FIRST AMENDMENT.

A. Face Is Not Impermissibly Content Or Viewpoint Based But Addresses The Severe Problem Of Anti-Choice Violence To Which Respondents Have Been Subjected.

The Fourth Circuit's decision agrees with that of all other courts, which have uniformly held that FACE does not violate the First Amendment. E.g., Woodall v. Reno, 47 F.3d 656 (4th Cir. 1995), cert. denied, 63 U.S.L.W. 3644 (June 19, 1995) (No. 94-1417); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994), appeals docketed, Nos. 95-1308, 95-1309, 95-1333, 95-1430, 95-1488, and 95-1494 (7th Cir.); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994), appeal docketed, No. 94-41194 (5th Cir.); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994). As the Fourth Circuit held, FACE is neither content or

viewpoint based nor unconstitutionally vague or overbroad. Pet. App. A13, A18.

Petitioners' argument that FACE is content based focuses on the specific intent requirement in FACE which prohibits certain activities against a person "because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).[7] Seizing on the word "because" (Pet. 20-21), Petitioners assert that FACE is therefore content based. But, as the Fourth Circuit held (Pet. App. A13), the Constitution permits Congress selectively to protect persons exercising their rights to obtain or provide reproductive health services, just as Congress selectively protects a range of civil rights,[8] the exercise of the right to vote,[9] the right to hold office,[10] and the enjoyment of equal housing opportunities.[11] Likewise, though Title VII makes it unlawful to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1) (emphasis added), Title VII does not prohibit unjust discrimination against an employee for other reasons, such as left-handedness. State and federal antidiscrimination and civil rights laws

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[7]More generally, Petitioners object to the use of the Madsen standard (Pet. 20), even though the court of appeals correctly used the standard set in United States v. O'Brien, 391 U.S. 367 (1968). Pet. App. A14.

[8]18 U.S.C. § 245.

[9]18 U.S.C. § 594.

[10]18 U.S.C. § 372.

[11]42 U.S.C. § 3631(a).

consistently have been upheld against First Amendment challenge. See, e.g., Hishon v. King & Spalding, 467 U.S. 69 (1984) (Title VII); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state antidiscrimination law).

Petitioners' weak attempt to conjure up a constitutional flaw fails in light of Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (violence and physical assaults not protected by First Amendment), upon which the court of appeals correctly relied in holding that FACE is not content-based. Pet. App. A12. Congress, like the state of Wisconsin, can enact laws to punish illegal conduct motivated by certain biases. Thus, Congress can address the intentional obstruction of access to reproductive health services because "this conduct is thought to inflict greater individual and societal harm," Mitchell, 113 S. Ct. at 2201, than, for example, obstructing access to businesses and schools, the examples Petitioners cite. Pet. 20. As the Fourth Circuit observed, "in passing the Access Act Congress determined that intentional interference with access to reproductive health services is more damaging to federal interests than activity that affects such access only incidentally, e.g., labor or environmental protesting." Pet. App. A13. Just as civil rights statutes may identify as especially troublesome violence triggered by a victim's race, so can FACE address the gauntlet of violence women face outside clinics providing reproductive health services.

Petitioners argue that FACE is viewpoint based while acknowledging that this infirmity is only "implicit in the text" of FACE. Pet 22. Petitioners therefore ignore the first principle of statutory construction: in interpreting a statute, "we look first to its language." Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993) (citations omitted). The unambiguous language of FACE applies to "whoever" engages in the prohibited conduct; therefore, as the Fourth

Circuit noted, "the viewpoint of the obstructer is irrelevant." Pet. App. A11.

In addition, FACE prohibits certain actions involving "reproductive health services." These services are broadly defined to include "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(e)(5). As the Fourth Circuit recognized (Pet. App. A11), FACE protects not only abortion clinics, but also facilities offering pregnant women alternatives to abortion, including AAA Women for Choice, Inc., the facility directed by Petitioner Patricia Lohman that offers pregnant women counsel regarding alternatives to abortion.

Moreover, Petitioners conveniently forget that most, if not all, statutes are enacted in response to specific problems. Indeed, "a statute is not rendered non-neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct." Pet. App. 13. See United States v. O'Brien, 391 U.S. 367 (1968) (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War). For example, even though certain statutes were enacted in response to civil rights protestors, they were upheld when written in a neutral fashion. In Cameron v. Johnson, 390 U.S. 611 (1968), for instance, the Court upheld against a First Amendment challenge the Mississippi Anti-Picketing Law, which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises," 390 U.S. 611, 612 n.1 (quoting Miss. Code Ann. § 2318.5 (1966)), even though the law had been enacted in response

to specific pickets held to protest racial voting discrimination, see id. at 620.

Because FACE is not content or viewpoint based, it should be evaluated under the three-part test set out in United States v. O'Brien, 391 U.S. 367 (1968), as the Court of Appeals concluded.[12] Pet. App. A14. To meet O'Brien's "substantial government interest" criterion, the Fourth Circuit correctly identified two groups of government interests, "protecting public health, safety and commerce [and] . . . protecting women and men from violence and threats in the exercise of their rights," which "together, or separately . . . are significant." Pet. App. A14-15. FACE also satisfies O'Brien's second prong because, as set forth above, it is "justified without reference to the message or viewpoint of anyone who might violate it." Id. at A15.

Finally, the last component of O'Brien is met because FACE "proscribes no more expressive conduct than necessary to protect safe and reliable access to reproductive health services." Id. at A16. FACE "leaves open ample alternative means for communication. In a non-violent, non-obstructive manner, protestors may still stand outside reproductive health facilities and express their anti-abortion message." Id.

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[12]Despite Petitioners' vehement opposition to this Court's opinion in Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994), that decision reinforces the constitutionality of FACE. In Madsen this Court rejected plaintiffs' characterization of an injunction, which prohibited, inter alia, essentially similar conduct that FACE bans, as a content and viewpoint based restriction on speech. Moreover, this Court noted that a generally applicable statute such as FACE, as opposed to the injunction at issue in Madsen, would be held to a lower standard of constitutional review. Id. at 2524-25.

B. Face Is Neither Overbroad Nor Vague.

FACE is neither overbroad nor vague. Its key statutory terms are defined in the statute, are not arcane, and have been upheld in decisions of this Court and other courts as not unconstitutionally vague.

Petitioners argue that though FACE may legitimately regulate conduct, it does so in an overbroad fashion, which may implicate protected conduct. Pet. 25. A statute is unconstitutionally overbroad in a facial challenge, however, only if it is substantially overbroad, meaning that it reaches a significant amount of speech protected by the First Amendment. Houston v. Hill, 482 U.S. 451, 458 (1987). However, as the court below observed, "even though [FACE] might be applied to some protected expression, such as peaceful picketing, that picketing would be prohibited only in the most narrow and justifiable circumstances." Pet. App. A17.

A statute is unconstitutionally vague if it fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The provisions of FACE that Petitioners assert are vague are nearly identical to terms upheld in Cameron v. Johnson, 390 U.S. 611 (1968). The statute in Cameron prohibited picketing in a manner that "obstructs" or "unreasonably interferes with free ingress or egress" to and from courthouses. 390 U.S. at 616. The Court in that case noted that the words "obstruct" and "unreasonably interfere" are easily understood, do not require guessing, and are not susceptible to numerous interpretations.

Far from chilling free expression FACE was carefully drafted to protect First Amendment rights and therefore

Petitioners are free to continue disseminating their anti-choice message. They are not free, however, to deprive women of their constitutional rights and engage in a campaign of violence and force against women and their health care providers.

CONCLUSION

As starkly demonstrated by the severe violence that has continued since its enactment, FACE is not a panacea. However, its prohibition of unlawful conduct is a needed response to a nationwide crisis that threatens Respondents, the public health and safety, and the reproductive liberties of all American women.

The Petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AMERICAN LIFE LEAGUE INC., *et al.*,

Petitioners,

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

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I. Respondents Do Not Address The *Lopez* Majority: There Is No Substantial Interstate Commerce Affect to Justify FACE

Respondents contend that FACE, in Respondent Reno's words, "passes muster under two of the categories identified by the Court" in *United States v. Lopez*, 115 S. Ct. 1624 (1995). Respondent Reno Brief, at 9. Ergo, FACE is sustainable under *Lopez* as (1) a proper use of "Congress's power to regulate or protect 'persons or things in interstate commerce'" and (2) "as an exercise of Congress's power to regulate 'activities that substantially affect interstate commerce.' " *Ibid.* But the key quoted language is that of Respondent Reno, not that of *Lopez.*

Preliminarily, Petitioners note that, as to (1), *supra,* neither *Lopez* nor other Commerce Clause cases speak to "protect" or "protection" but to "regulate" or "regulation." The Commerce Clause is authority to regulate persons or things in interstate commerce, not to protect them.

Respondents attempt to fabricate a Commerce Clause *criminal* law stance that reflects the sweeping *regulatory* law dimension which the federal courts evolved during the 59 years preceding *Lopez* - that is, an almost irrebuttable presumption that if Congress felt a local activity implicated interstate commerce, federal jurisdiction would be sustained, with or without demonstrable substantiality. It mattered little whether the interstate commercial impact were slight or substantial. A plausible, if thin, interstate reed was adequate. *Wickard v.*

Filburn, 317 U.S. 111 (1942) (a trivial quantity of homegrown wheat integrally a part of a national crop regulatory system). *Lopez*, however, changed that, enquiring more discerningly not only about substantially of impact but also about the very existence of economic activity or commerce. Further, Repondents attempt to apply their expansive Commerce Clause reading not to regulatory, but to criminal, law. FACE, after all, regulates nothing; it criminalizes.

To engineer this legerdemain, Respondent Reno quotes not from the *Lopez* majority opinion but from one of two concurrences. "The Court [did not] reason . . ." as Respondent Reno contends, Respondent Reno Brief, at 11; two concurring Justices did. However, Justices Kennedy and O'Connor also signed the majority opinion. Consequently, their concurring comments are to be interpreted in the context of the majority opinion, not as the holding of the Court.

Respondent Reno's approach reveals the paucity of Respondents' arguments: Respondents find no support in the Opinion of the Court and must resort to out-of-context reliance upon a concurrence, ignoring the fact the concurring Justices also signed the Opinion of the Court.

FACE presents a case as clear as the *Lopez* statute in dealing with private conduct having no substantial affect upon interstate commerce. Congressional efforts to justify FACE in Tenth Amendment terms failed to make a substantial link between what it was designed to do and interstate commerce. As Chief Justice Rehnquist, addressing Justice Breyer's dissent, wrote in *Lopez*:

> Justice Breyer rejects our reading of precedent and argues that " Congress. . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 1664. Again, Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service -- namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." *Ibid.* We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

115 S. Ct. 1633.

Respondents argue against Petitioners in much the same way Justice Breyer argued against the majority in *Lopez*. But under this reasoning, as Chief Justice Rehnquist rightly points out, there is no limit to legislation in any area Congress wishes to enter, however local in nature. The Constitution makes the Federal Government one of limited powers (U.S. Const., Art. I, 4, §8), a restriction that virtually had disappeared

in regulatory law over the 59-year diversion. *Lopez* attempts to restrict the further emasculation of those constitutional limitations, particularly as to criminal law applicability. To accept Respondents' arguments would signal Congress and the federal courts that the intervening (and nullifying) approach to the Tenth Amendment, gone for a short time, was reinstated; and, more dramatically, that the expansive Commerce Clause sweep evolved over 59 years now, notwithstanding *Lopez,* was to be extended to criminal law.

Respondent Reno claims that FACE "may be sustained as an exercise of Congress's power to regulate 'activities that substantially affect interstate commerce.'" Opposition Brief, at 9. But nowhere does Respondent Reno demonstrate that this conclusion is based upon anything more than Congress's desire to render impossible peaceable (and nonpeaceable) prayer, protest and demonstration around abortion clinics. Absent is any real interstate commerce justification for intruding into what are essentially local matters where trespass and other local laws abound to preserve property rights and the peace and to prosecute violent crimes against abortion facilities and personnel.

Congress spoke of interstate commerce in committee hearings and cited alleged connecting links with violence around public health facilities, but nowhere did anything more than offer conclusional findings based upon inadequate showings of substantial interstate commerce impact. As Chief Justice Rehnquist also said in *Lopez*, that in reviewing legislation, as "a part of our independent evaluation of constitutionality under the Commerce Clause we of course

consider legislative findings, and indeed even congressional committee findings . . ." 115 S. Ct. at 1631. In short, this Court is not bound by such findings to establish substantial impact upon interstate commerce. Respondents, not content with inadequate and conclusional congressional findings, go further, enveloping every peaceful citizen who prays, sidewalk-counsels or demonstrates in some kind of alleged national conspiracy the totality of which substantially affects interstate commerce.[1]

II. Respondents Skirt any Definition of Nonviolent Physical Obstruction of Entrances to Clinics and Leave FACE in Definitional Limbo

Nowhere in their opposing briefs do Respondents try to deal with the vexing questions raised by FACE's prohibition of nonviolent physical obstruction of entrances to abortion clinics. Respondents do mention *United States v. Wilson,* 880 F. Supp. 621 (E.D. Wis. 1994), appeals pending, Nos. 95-1308, 95-1309, 95-1933, 95-1488 & 95-1494 (7th Cir.) Respondent

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[1] There may be scant limitation to the reach of *substantial affect* under Respondents' reasoning: Citizens who peacefully pray or demonstrate for or against nuclear power plants, military bases, pipelines, forests, open space, dams, affirmative action, homosexual activity, gun control and the like would be subject to federal jurisdiction as substantially affecting interstate commerce (and subsuming an economic activity). And if one blocked, even temporarily or accidentally, a proscribed entrance, and intended (economic, political, social or other) injury, the next FACE-type enactment would apply.

Reno Brief, at 12; Respondents National Abortion Federation, et al. Brief, at 6, 12. But they do not tell the Court that the District Court found one section of FACE to be constitutionally flawed -- namely, the provision in 18 U.S.C. § 248(a)(1) that prohibits as a crime something Congress termed in § (b), the penalties provision, "a non-violent physical obstruction" of entrances to reproductive health facilities with a fine of not more than $10,000 and imprisonment of not more than six months or both, for a first offense.

Respondents also fail to address *Cheffer v Reno,* 55 F.3d 1517, 1521 (11th Cir. 1995), which sustained the constitutionality of FACE but held FACE, 28 U.S.C. §248(a)(1), applicable only to *physical* "force or threat of force":

> The term "force" is often interpreted to mean "physical force." See *Johnson v. Mississippi,* 421 U.S. 213, 222-227, 95 S.Ct. 1591, 1597-1599, 44 L.Ed.2d 121 (1975) (interpreting similar language -- "by force or threat of force willfully injures, intimates, or interferes with" - to provide protection against violence). The context of [FACE] reinforces the "physical force" interpretation.

This increases the uncertainty as to FACE's applicability and dilutes its supposed substantial affect upon interstate commerce, for surely that substantial affect which Respondents perceive would be identical whether a criminal defendant ran afoul of the statute by nonphysical or physical force.

Nor do Respondents attempt to deal with the Tenth Amendment, not to mention the First Amendment questions inherent in criminalizing such conduct that does not involve physical violence. Of course, Congress did not define what it had in mind, thus making potentially criminal the peaceful picketing and praying of Petitioners and other like-minded individuals around abortion facilities, which naturally can cause nonviolent physical obstruction of clinic entrances (however temporary), although Petitioners and like-minded protesters are standing on public sidewalks or streets and do nothing that can be interpreted as threatening.

In *Wilson* the District Court analyzed Tenth Amendment considerations limiting the power of the Federal Government and concluded:

> Applying these principles to the case at bar, it is without question that non-violent physical obstruction is closely analogous to simple trespass, which historically and traditionally has rested within the domain state, and even local, authorities. Indeed, in such situations, Congress itself acknowledges that Tenth Amendment concerns are of prime importance in deciding whether or not to intervene in matters of state and local concern. 42 U. S. C. § 10501, discussed, *supra.* Therefore, the Tenth Amendment analysis clearly confirms the Court's earlier conclusion that Congress has exceeded the scope of its Commerce power.
>
> . . . This case represents a point at which the bedrock constitutional principle of enumerated

> powers is strained beyond meaning and recognition and a point at which the delicate balance and distinction between the powers of the Federal Government and the powers of the States is irretrievably lost.
>
> 880 F. Supp. at 634.

III. Strict Scrutiny Is the Proper Review Level

Respondent Reno asserts that *Madsen v Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), demonstrates Petitioners' error in contending FACE should be subject to strict scrutiny. Respondent Reno Brief, at 18, n. 7. But Petitioners correctly described *Madsen:* FACE is a statute, not an injunction; *Madsen* provides no guidance in evaluating whether FACE is not content- and viewpoint-neutral.

Intervening Respondents compound the error, mystifyingly accusing Petitioners of "vehement opposition" to *Madsen.* Yet Petitioners have expressed no opinion about the wisdom of *Madsen,* only arguing *Madsen* affords no basis for any scrutiny less than strict scrunity because it is inapplicable. The scrutiny level which FACE commands is of fundamental, and precedental, import, itself an adequate ground for Supreme Court review.

CONCLUSION

Petitioners raise serious constitutional questions involving the Commerce Clause, the First, Tenth and Fourteenth Amendments. For the foregoing reasons and those set out in the Petition, summarized in Part III, none of which Respondents convincingly address, this honorable Court should grant the Writ.

Respectfully submitted.

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